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ABSTRACT

This report is the third in a series of independent analyses by the National Council on Disability on federal enforcement of civil rights laws. This report looks at the Americans with Disabilities Act (ADA) enforcement activities from 1990 to 1999 of four key federal agencies: the Department of Justice, the Equal Employment Opportunity Commission (EEOC), the Department of Transportation, and the Federal Communications Commission. Findings indicate that while the Clinton Administration has consistently asserted its strong support for the civil rights of people with disabilities, the federal agencies charged with enforcement and policy development under ADA have been underfunded, overly cautious, reactive, and lacking any coherent and unifying national strategy. In addition, it is found that enforcement agencies have not consistently taken leadership roles in emergent issues. The following recommendations are made: (1) the Department of Justice should provide assertive leadership for ADA implementation and develop a strategic vision and plan for ADA enforcement across the federal government; and (2) the Departments of Justice and Transportation, the EEOC, and the Title II referral agencies should strengthen methods for the timely and effective enforcement of ADA. Appendices include a summary of the ADA. (CR)

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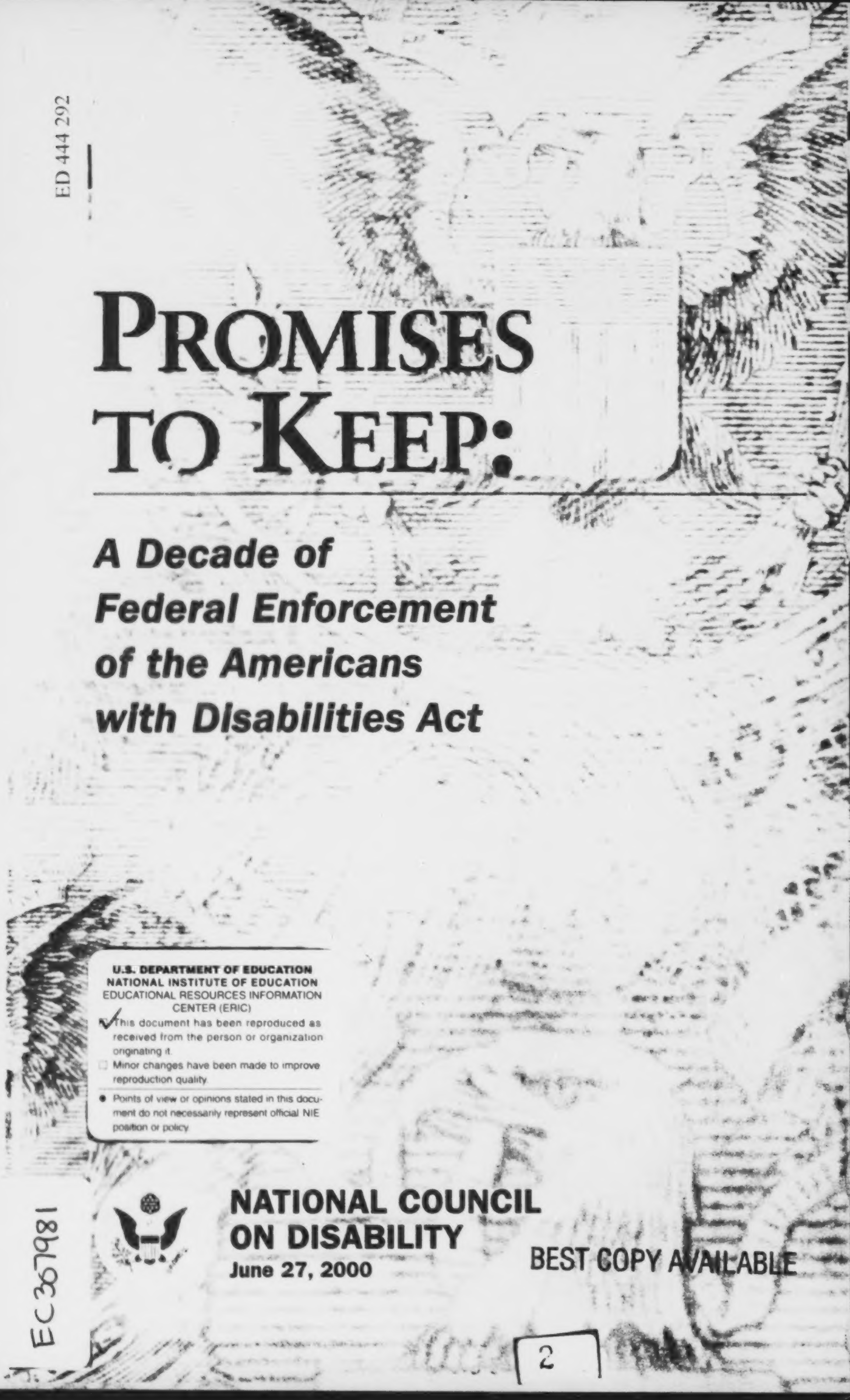

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PROMISES TO KEEP:

A Decade of Federal Enforcement of the Americans with Disabilities Act

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NATIONAL COUNCIL
ON DISABILITY
June 27, 2000

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Promises to Keep:
A Decade of Federal Enforcement of the Americans with Disabilities Act

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NATIONAL COUNCIL ON DISABILITY

An independent federal agency working with the President and Congress to increase the inclusion, independence, and empowerment of all Americans with disabilities.

Letter of Transmittal

June 27, 2000

The President
The White House
Washington, DC 20500

Dear Mr. President:

On behalf of the National Council on Disability (NCD), I am pleased to submit a report entitled *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act*. This report is the third in a series of independent analyses by NCD of federal enforcement of civil rights laws.

The series grew out of NCD's 1996 national policy summit, attended by more than 300 disability community leaders from diverse backgrounds, who called upon NCD to work with federal agencies to develop strategies for greater enforcement of existing disability civil rights laws. In March 1999, NCD produced its first report, *Enforcing the Civil Rights of Air Travelers with Disabilities*. The second report, *Back to School on Civil Rights*, on the enforcement of the Individuals with Disabilities Education Act, was issued in January 2000. The enforcement reports to follow in this series will be on the Fair Housing Amendments Act of 1988 and Section 504 of the Rehabilitation Act.

Promises to Keep looks at the Americans with Disabilities Act (ADA) enforcement activities from 1990 to 1999 of four key federal agencies: the Department of Justice, the Equal Employment Opportunity Commission, the Department of Transportation, and the Federal Communications Commission. NCD's findings reveal that while the Administration has consistently asserted its strong support for the civil rights of people with disabilities, the federal agencies charged with enforcement and policy development under ADA have, to varying degrees, been underfunded, overly cautious, reactive, and lacking any coherent and unifying national strategy. In addition, enforcement agencies have not consistently taken leadership roles in clarifying "frontier" or emergent issues.

This report provides a blueprint for addressing the shortcomings that have hindered ADA compliance and enforcement until now. NCD stands ready to work with our sister agencies and other stakeholders inside and outside the government to develop that strategy. Indeed, throughout the preparation of this report, federal agencies have shown great willingness to collaborate with NCD in advancing the broad and enlightened enforcement of ADA. We look to the next decade of enforcement with anticipation that the promises of ADA can and will be realized through the vision and dedicated efforts of those who believe that equality of opportunity creates liberty and justice for all.

Sincerely,

Marca Bristo

Marca Bristo
Chairperson

(The same letter of transmittal was sent to the President Pro Tempore of the U.S. Senate and the Speaker of the U.S. House of Representatives.)

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The task of assisting NCD in building upon and supplementing the volume of analysis, conclusions, and recommendations in the original report to produce this final version was handled by consultant Robert L. Burgdorf, Jr. Overall NCD staff responsibility for the report was initially supervised by Andrew J. Imparato, former general counsel and director of policy, and completed under the supervision of Jeffrey T. Rosen, current general counsel and director of policy. Kathleen A. Blank, attorney and program specialist, was the NCD project manager responsible for assisting and coordinating the work of both contractors and staff in producing this report. Overall administrative responsibility for the report was under the direction of Ethel D. Briggs, executive director.

NCD would also like to thank the many people who gave of their time and agreed to be interviewed for this report. Special acknowledgment goes to the staff of the U.S. Equal Employment Opportunity Commission, the U.S. Department of Justice, the U.S. Department of Transportation, the Federal Communications Commission, and the other federal agencies, who not only answered many questions but gathered documents and shared data with the research team. In addition, they reviewed preliminary drafts of this document for technical accuracy and engaged in an ongoing dialogue with NCD about the findings and recommendations. The assistance of the staff of the U.S. Commission on Civil Rights is also gratefully acknowledged for generously sharing their data and the fruits of their research on Titles I and II. Finally, NCD would like to thank the people in the disability community—stakeholders, advocates, and attorneys—who shared their experiences with the enforcement of ADA and provided their assessments and insights about the strengths of enforcement and the areas that merit improvement.

"UNEQUAL PROTECTION UNDER LAW" SERIES

This report, the third in the National Council on Disability's (NCD) report series entitled "Unequal Protection Under Law," examines enforcement of the Americans with Disabilities Act (ADA) between 1990 and 1999, relying on statistical and other federal agency data developed during that time frame. Enforcement issues identified in this report, such as lack of leadership and insufficient resources, parallel those documented in the earlier reports *Enforcing the Civil Rights of Air Travelers with Disabilities: Recommendations for the Department of Transportation and Congress* and *Back to School on Civil Rights.* This report also identifies concerns similar to those expressed in *Lift Every Voice: Modernizing Disability Policies and Programs to Serve a Diverse Nation* and *From Privileges to Rights: People with Psychiatric Disabilities Speak for Themselves* about accommodating the special needs of people with disabilities from diverse cultures, those with cognitive disabilities, and those labeled with psychiatric disabilities, especially those living in institutions. It echoes the same call for their inclusion in policy-making, setting enforcement priorities, and accommodation in agency outreach efforts. The enforcement reports to follow in this series will be on the Fair Housing Amendments Act of 1988 and Section 504 of the Rehabilitation Act.

A synthesis of the lessons learned from all these reports will be the basis for a new document, *New Paradigms for a New Century: Rethinking Civil Rights Enforcement* to be released formally in the fall of 2000. In its final form, this document will include input from civil rights experts who attended the NCD forum, Think Tank 2000: Coalitions Advancing the Civil and Human Rights of People With Disabilities From Diverse Cultures and the Civil Rights Working Retreat, held in May and June 2000, as well as from grassroots communities in 14 urban and rural centers representing every region in the country. It is NCD's intention that these reports, and all the dialogue to follow, will help bring about a renewed commitment to keeping America's promise of equality of opportunity and inclusion for all people.

EXECUTIVE SUMMARY

In the decade after its enactment, the Americans with Disabilities Act (ADA) has begun to transform the social fabric of our nation. It has brought the principle of disability civil rights into the mainstream of public policy. The law, coupled with the disability rights movement that produced a climate in which such legislation could be enacted, has fundamentally affected the way Americans perceive disability. The placement of disability discrimination on a par with race or gender discrimination exposed the common experiences of prejudice and segregation and provided clear rationale for the elimination of disability discrimination in this country. ADA has become a symbol, internationally, of the promise of human and civil rights and a blueprint for policy development in other countries. It has permanently changed the architectural and telecommunications landscape of the United States. It has created increased recognition and understanding of the manner in which the physical and social environment can pose discriminatory barriers to people with disabilities. It is a vehicle through which people with disabilities have made their political influence felt, and it continues to be a unifying focus for the disability rights movement.

Although ADA signifies the achievement of a bipartisan political movement of people with disabilities, ADA is not self-acting in ensuring that its provisions are fully and finally implemented and enforced. Federal Government commitment to ADA's timely implementation and effective enforcement is essential to fulfill the law's promises. Indeed, Congress declared in ADA its intent that the Federal Government play a "central role" in enforcing the requirements of the law.[1] As they did with the earlier civil rights laws, federal enforcement agencies have a key responsibility to advance the interpretation and implementation of ADA through enforcement actions, policy guidance, and participation in the development of precedent-setting court decisions. The current administration has had the unique task of overseeing federal implementation and enforcement of ADA in its embryonic state, with the concomitant opportunities to direct clear and effective strategies for ending centuries of discrimination and segregation by disability.

The challenge of this administration has been, in part, to reverse the historical patterns of poor enforcement that characterized disability civil rights laws enacted prior to ADA. As Timothy M. Cook, a former executive director of the National Disability Action Center and a leading civil rights litigator of his time, reminded disability rights advocates shortly after ADA's enactment, if the act is administered and enforced in a fashion similar to the earlier analogous disability rights statutes, the legacy of discrimination and segregation on grounds of disability will not be dealt with "root and branch" as Congress intended.[2] Then as now, the issue is whether federal administrative agencies are taking those actions necessary to carry out the directives of ADA and thus not "allowing the ADA to accompany its legislative predecessors languishing in the hollows of nonenforcement."[3]

This report reveals that while this administration has consistently asserted its strong support for the civil rights of people with disabilities, the federal agencies charged with enforcement and policy development under ADA, to varying degrees, have been overly cautious, reactive, and lacking any coherent and unifying national strategy. Enforcement efforts are largely shaped by a case-by-case approach based on individual complaints rather than an approach based on compliance monitoring and a cohesive, proactive enforcement strategy . In addition, enforcement agencies have not consistently taken leadership roles in clarifying frontier or emergent issues — issues that, even after nearly 10 years of enforcement experience, continue to be controversial, complex, unexpected, and challenging.

Some of the leadership and enforcement deficiencies noted in this report appear to be related to the "culture" of particular bureaucracies and how these agencies have hewed to their traditional mission and circumspectly defined their constituency. In other cases, there has been a demonstrated fear of taking positions on new or controversial issues, or too great a concern for potential backlash if a strong position is taken. Critically, many of the shortcomings of federal enforcement of ADA identified in this report are inexorably tied to chronic underfunding and understaffing of the responsible agencies. These factors, combined with undue caution and a lack of coherent strategy, have undermined the federal enforcement of ADA in its first decade. Their net impact has been to allow the destructive effects of discrimination to continue without sufficient challenge in some quarters. Arguably, the major impact of this weak enforcement environment has been its contribution to the problematic federal court interpretations of key ADA principles that have unjustly narrowed the scope of the law's protections.

The Promise of Inclusion and Equal Opportunity

The passage of ADA resulted from a long struggle by Americans with disabilities to bring an end to their inferior status and unequal protection under law in our society. Census data, national polls, and other studies had long documented the severe social, vocational, economic and educational disadvantages of people with disabilities.[4] Besides widespread discrimination in employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services,[5] people with disabilities faced the additional burden of having little or no legal recourse to redress their multidimensional exclusion.[6]

Not only did ADA directly address discrimination in terms of its personal impact on the lives of people with disabilities, it also addressed the huge economic toll on the nation resulting from "billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."[7] These problems resulted not only from the barriers created by lack of access to education and employment. Federal policy itself perpetuated dependency through disability programs "reflect[ing] an overemphasis on income support and an underemphasis on initiatives for equal opportunity, independence, prevention, and self-sufficiency."[8]

In a bipartisan recognition of the moral and economic benefits to be realized, not only to people with disabilities as individuals but to the nation overall,[9] Congress enacted ADA "(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and] (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[10]

Under ADA, the U.S. Department of Justice (DOJ), the U.S. Equal Employment Opportunity Commission (EEOC), the U.S. Department of Transportation (DOT), and the Federal Communications Commission (FCC) have primary federal enforcement responsibilities as the law applies respectively to private employers, state and local governments, all facilities and programs open to the public, and providers of telecommunications equipment and services. The mechanisms and enforcement actions of these agencies related to complaint handling and compliance monitoring, as well as technical assistance and public information, are examined and assessed here along with cross-cutting issues for federal enforcement of ADA overall.

The National Council on Disability (NCD), as the independent federal agency that first proposed and drafted ADA, undertook this report in response to two mandates: a congressional mandate to monitor the implementation of ADA and a grassroots mandate to work with federal agencies toward more vigorous enforcement of disability civil rights laws.[11] This report, the third in a series of independent analyses by NCD of federal enforcement of civil rights laws, assesses a decade of ADA implementation within the federal enforcement agencies as well as the net impact arising from their collective enforcement activities on overall ADA implementation, including emerging issues raised by recent Supreme Court decisions.

Halting, Reactive Leadership by Federal Enforcement Agencies

While federal agencies have complied with their obligation to put the required regulations and complaint-handling procedures in place, they have yet to develop a cohesive, overall plan for ADA implementation and enforcement. Across the various enforcement agencies, the visible enforcement activities involve handling complaints and filing lawsuits. These are reactive methods of enforcement. Proactive strategic enforcement activities are less evident. Little compliance monitoring has been incorporated into ADA enforcement. Enforcement efforts seem more focused on "micro," individual cases. This means lost opportunities, because findings at the individual level often do not lead to an examination of larger systemic issues. Overall, the federal enforcement effort has been uneven, lacking in robustness, and suffering from low visibility in many areas.

The overall impact of ADA has been seriously diminished by the lack of sufficient leadership in the development of a vision for ADA enforcement across the various agencies. Although heads of federal enforcement agencies have consistently expressed a commitment to the assertive implementation of ADA's requirements, their support has not translated into coordinated and authoritative enforcement leadership at the staff level. The lack of leadership and strategy has been particularly troubling, given that the federal courts have been dismantling the law's protections and routinely disregarding the positions of the federal agencies on critical issues such as the definition of the protected class, the appropriate analysis for determining the reasonableness of a particular accommodation, and the constitutionality of Title II of ADA.

In the individual federal agencies, a lack of leadership frequently manifests itself as inconsistency in the way an agency carries out its enforcement responsibilities. The Department of Transportation is one of the clearest examples of inconsistent intraagency enforcement activity. Six quasi-independent modes within DOT are responsible for enforcing the many transportation provisions of ADA. Each mode is different, sometimes strikingly so, in the interpretation of ADA requirements, the approach to complaint investigation, and the priority placed on public education. Some modes habitually gave the covered entities broad discretion in meeting ADA's accessibility requirements and timetables, while others communicated a clear expectation of timely compliance. While some modes were proactive in disseminating public education information with specific information to consumers about their rights, others provided only the most general information on grounds that it was not within their purview to provide more specific information about rights under the law. This kind of inconsistency greatly undercut DOT's overall effectiveness in establishing an expectation of compliance with ADA's nondiscrimination mandate among all the covered entities within its purview.

While all federal agencies share leadership responsibility for the effective administration of ADA, the broad ADA enforcement authority of the Department of Justice makes it the appropriate agency for directing the overall enforcement strategy. Had all the federal agencies worked more closely in collaboration with each other and stakeholders on developing a national strategy, ADA would likely be in a much stronger position as we mark the 10th anniversary of its passage. The current challenges to Title II of ADA illustrate the critical necessity of cooperation, coordination, and collaboration among federal agencies charged with ADA enforcement. The agencies have engaged in some collaboration, and they meet regularly as a group. However, insufficient collaboration takes place for the Title II referral process, which involves eight different cabinet-level agencies in complaint handling and enforcement and the Department of Justice for litigation of Title II violations. DOJ has not exercised enough oversight and tracking of Title II complaints, and the seven referral agencies have not sufficiently cooperated with DOJ to prepare and refer cases that would advance the interpretation of ADA. For example, at the time research for this report was completed, the Department of Transportation had never referred findings of discrimination resulting from any ADA complaint to DOJ for litigation. The development of Title II case law has been limited by the few referrals of Title II violations from the agencies to the DOJ for litigation. When it has had the opportunity to litigate referred complaints, DOJ has consistently furthered the goal of effective and instructive implementation of ADA by taking strong and appropriate stances on issues.

The overall record indicates that the enforcement agencies have been hesitant to exercise leadership in litigating difficult or controversial issues, or to maintain sufficiently rigorous positions in settlement negotiations. The difference is quite dramatic when an agency manifests strong leadership, takes a definitive and enlightened position on an issue, and advocates robustly for it, as EEOC did with reversing a disturbing trend in the case law whereby individuals were being estopped from pursuing employment discrimination suits under ADA if they had applied for disability benefits after being terminated. In contrast, when an agency forsakes a leadership role, takes an equivocal and muddled position, and plays only a minor and somewhat negative role in the resolution of an issue, as EEOC did in its confined, technical approach to the definition of "disability," it may contribute to an adverse climate such as that which eventually culminated in the Supreme Court decisions restrictively construing the definition.

In many of the most important policy issues for ADA, such as the definition of disability and the application of the ADA requirement for public services in the most integrated setting, the federal agencies have too often waited for the private bar to bring the key litigation. Federal agencies have recurrently entered important cases late in their progression via amicus participation. Moreover, federal agencies generally have not demonstrated a proactive strategy for acting quickly to limit the impact of court decisions that have eroded important protections of ADA. Nor is a strategy evident for selecting and litigating ADA cases against powerful entities that interact with large numbers of people daily. Despite the slow increase of class action litigation overall, far too few class cases are developed and litigated compared with individual plaintiff cases. Finally, our investigators observed a lack of coordination on case selection and overall litigation strategy within and among agency field offices engaged in litigation.

Early and proactive stances on the interpretation of the law through regulations and subregulatory policy guidance have a critical influence in shaping how the law will be implemented by the stakeholder communities and interpreted by the courts. Formal and informal guidance from federal agencies in understanding the law's requirements serve both to encourage compliance and reduce lawsuits challenging the law's reach. The Department of Justice has made minimal use of its authority to issue additional regulations and subregulatory guidance under ADA. DOJ has taken constructive policy positions primarily in the context of litigation. For example, DOJ has been criticized for not providing timely guidance asserting that disadvantageous insurance terms or coverage based on distinctions between physical and mental impairment without actuarial justification is discrimination. Many view this void as having contributed to the stream of lawsuits challenging the inclusion of insurance under Title III. EEOC has often effectively used subregulatory guidance to promote the implementation of Title I requirements. In the face of an active movement to exclude people with psychiatric disabilities from the protections of the law, EEOC's timely guidance on how the ADA nondiscrimination mandate applies to people with psychiatric disabilities has been significant in forestalling this outcome. Unfortunately, however, EEOC has at times used subregulatory and other guidance documents to propound misguided policy positions, including its overly technical approach to the definition of disability, the "danger to self" criterion in the "direct threat" standard, a duration standard for disabilities, and others described in this report.

The nature or extent of inaccurate and misleading negative media portrayals of ADA surfaced at several points in the law's first 10 years and continue to this day. Enforcement agencies have not been consistently stalwart in their reaction to high-profile stories and broadcasts incorrectly portraying ADA and its objectives. A steady stream of inaccurate and misleading media portrayals of ADA have undermined public support for ADA, caused a backlash against the expansion of the civil rights of individuals with disabilities, and perhaps fostered a perception that noncompliance was not an unreasonable response to an "excessive" mandate. The absence of strong and visible Federal Government leadership has contributed to the concern that there is little balance in the public discourse on ADA and a general public misunderstanding of the aims and requirements of ADA. It has also allowed ADA's detractors to develop a mainstream reputation for hard-hitting, objective criticism that is not well deserved. The challenge for the ADA enforcement agencies is to find the means to reverse the negative effects of years of public misrepresentation of the law before public opposition reaches a critical mass.

Justice Delayed

Under its current leadership, federal enforcement agencies have steadily improved the efficiency and procedural consistency in their enforcement activities. Nevertheless, ADA enforcement agencies remain agonizingly slow in the performance of their enforcement duties. The most noticeable problems involve complaint handling, with significant variations in the processes across the different agencies. These differences may be attributed in part to the role that complaint processing has in an agency's overall mission. While the Department of Justice refers or resolves nearly every Title II complaint, it does not open for investigation most Title III complaints. For Title III, DOJ is given authority to pursue complaints and litigation only selectively, focusing on pattern or practice cases and on instances that raise an issue of general public importance. Although its complaint procedures are evolving, DOJ is often very slow in referring Title II complaints or communicating with complainants about its selective handling of Title III complaints. The EEOC has significantly reduced the time required to process most complaints, but in the initial years of ADA, the processing time for Title I complaints was also very slow, in many cases more than two years. In some of the referral agencies, procedures for complaint handling are not well developed or documented.

The net impact of these slow actions has been to mute enforcement, unnecessarily extend the effects of discrimination for victims, and undermine the confidence of charging parties and covered entities in the ability of the federal agencies to investigate discrimination complaints in a timely, fair, and effective manner.

Despite the fact that ADA requires existing agencies to take on new tasks and activities, the budgets and approved staffing levels of these agencies have not changed in a commensurate manner. At the EEOC, the first real increases in budget did not occur until nine years after ADA implementation began. Both the EEOC and the Disability Rights Section of the Department of Justice received increases for ADA enforcement in fiscal 1999. However, the EEOC saw a large increase in its caseload following the implementation of ADA in 1992. At the Department of Justice and in the operating administrations in the Department of Transportation, new responsibilities for complaint processing and compliance reviews had to be developed with no additional funds.

Congress has not provided adequate funding for true enforcement commensurate with the ADA's strong mandates, even when the administration has assertively presented the need for greater resources to properly enforce the law. While Congress recently has increased funding for some agencies' ADA enforcement activities, the long period of substantially inadequate funding has taken its toll. Even with the most recent increases, all ADA enforcement agencies still require additional resources, not only for personnel but to purchase technology and data management systems to enable them to efficiently and correctly perform their enforcement responsibilities. As a result of insufficient funding and staff, aspects of enforcement—such as the certification of building codes, the monitoring of transit system accessibility, the issuance of architectural or transportation standards as regulation, and the time required to determine whether or not to file a lawsuit or intervene in an ongoing case—have proceeded slowly.

In part to make up for inadequate investigative staff and resources, the enforcement agencies have in common an increased use of mediation (alternate dispute resolution or ADR), not only for disability civil rights laws but for all civil rights laws. The agencies report success and satisfaction with their limited mediation experiences to date. The use of mediation by agencies enforcing ADA will likely continue to increase because Congress mandates and supports it. Thus, it is vitally important that mediation be carried out in a way that helps expedite successful compliance with ADA and does not compromise an individual's civil rights. This requires careful agency oversight of the mediation activities and of the settlements achieved through mediation. The Department of Justice currently does not involve itself in the mediation process in either an oversight role or as a signatory to the agreement as a means of securing enforcement, preferring to rely on trained mediators to attain a satisfactory outcome.

The examination of mediation in the different venues elicited many common questions. The issues raised by these questions are largely beyond the scope of this report and require further study. There is a real risk that the complainant may not be on a level playing field with the respondent. The skill and knowledge of the mediator, whether the complainant is alone or comes with the support of an advocate, and whether representation by an attorney is equal (e.g., neither side has an attorney or they are both represented) are key factors.

Mixed Results from Outreach Efforts

ADA specifically directs agencies to engage in technical assistance and to produce technical assistance materials. The enforcement agencies have generally met their obligations in this area; some excellent technical assistance documents have been published, and large-scale, ongoing training and public information efforts have occurred. However, there has never been a governmentwide evaluation of the effectiveness of these efforts nor a reassessment of the outreach strategy. Critical pockets remain where additional information and assistance are needed. In the areas of employment and transportation, much of the focus has been on the covered entities. Less information has been targeted to people with disabilities so they know their rights and how to pursue enforcement of them.

There have been few efforts to ensure that technical assistance materials and training opportunities in culturally appropriate formats are equally available to underserved individuals and covered entities in rural and culturally diverse communities, people with cognitive disabilities, people labeled with psychiatric disabilities, people living in institutions, and youth and young adults. While some federal agencies have made varying degrees of progress in tailoring their outreach and public education to address the needs of these diverse groups, there is a notable dearth of such materials in relation to the need of traditionally underserved groups for information about ADA and how to access their rights. Resource limitations have contributed to deficits in technical assistance and other outreach activities. Technical assistance from the Department of Justice and other agencies in emergent areas of ADA policy and enforcement, such as genetic discrimination or Web site accessibility requirements, is also needed.

Insufficient Consultation in Developing Enforcement Priorities

Although enforcement agencies all have some relationship with the disability community, there are few opportunities for appropriate input from people with disabilities on setting overall priorities for policy development and litigation, developing appropriate strategies for mitigating the impact of negative court decisions, determining appropriate and feasible accommodations, and advising on the design and dissemination of public education materials targeting specific constituent groups of the disability community, such as people from diverse cultures, people with limited or no English proficiency, those living in institutions, those with cognitive disabilities, and those labeled with psychiatric disabilities.

materials targeting specific constituent groups of the disability community, such as people from diverse cultures, people with limited or no English proficiency, those living in institutions, those with cognitive disabilities, and those labeled with psychiatric disabilities.

Input from the disability community is especially important in verifying that covered entities have taken action to correct ADA violations. As an example, some Department of Transportation modes routinely rely on self-reporting by local transportation authorities to verify that required corrections of noncompliant conditions were implemented, and do not consult with the affected disability community to determine whether the corrective action actually took place.

Recommendations

NCD makes the following preliminary recommendations to strengthen federal enforcement of ADA:

The Department of Justice should provide robust and assertive leadership for ADA implementation and to develop a strategic vision and plan for ADA enforcement across the Federal Government.

> Given its broad ADA enforcement authority, the Department of Justice should assume responsibility for leading an effort to develop a strategic plan for ADA implementation and enforcement, and the attorney general should serve as the spokesperson for the overall federal vision and strategy for ADA implementation. In providing leadership for ADA implementation, the Department of Justice should require annual reporting from the other agencies with ADA enforcement responsibilities and should itself issue an annual report to the president and Congress on the issues and activities associated with ADA implementation and enforcement. Leadership from the Department of Justice should focus on the "big picture" and emergent ADA issues, and on ensuring that ADA enforcement includes not only complaint processing but compliance monitoring, strategic litigation to develop ADA case law, coordination among the enforcement agencies, ongoing issuance of subregulatory guidance and information, and outreach so that ADA is correctly understood by the covered entities, people with disabilities, the media, and the public.

The Departments of Justice and Transportation, the Equal Employment Opportunity Commission (EEOC), and the Title II Referral agencies should strengthen methods for the timely and effective enforcement of ADA.

Complaints need to be processed by a more consumer-responsive and credible enforcement system that provides timely and high-quality investigations, findings, and resolutions. All agencies should implement systems so that persons who file a discrimination complaint receive a prompt acknowledgment from the processing agency; subsequent communication that updates the complainant at least every three months on the status or progress of the complaint; and information from the very start about how the complaint investigation process works and what to expect from the agency handling the complaint. Agencies should work to shorten the time required to complete a thorough assessment of the facts and merits of a complaint. The EEOC, where complaint handling is a major function, has a well-developed and documented set of procedures. DOT and DOJ, agencies with broad missions and in which ADA complaint investigation is one of many complex enforcement activities, generally have less clearly articulated procedures. Greater exchange of expertise about methods for investigating and documenting complaint processing should take place to improve complaint handling across all titles of ADA. The apparent thoroughness and competence of the complaint investigation, finding, and resolution activities need to be improved to achieve greater credibility with both complainants and respondents.

The Department of Justice should make use of regulations, subregulatory guidance, and technical assistance documents to take a leadership role on policy issues in Title II and Title III enforcement and to help covered entities understand and comply with their responsibilities. The EEOC should issue regulatory, subregulatory, and technical assistance documents, as necessary, to repudiate the misguided and erroneous prior policy positions, identified in the report, that it has enunciated or contributed to. In particular, the EEOC should issue subregulatory guidance to clarify the breadth of the third prong of the definition of disability and the inappropriateness of technical constraints on the concept of limitations on the major life activity of working, toward the end of persuading courts to focus more on the allegedly discriminatory actions of employers rather than the characteristics of and precise degree of limitations of the complainant.

Agency resources are a key influence on the ability of an agency to effectively meet its enforcement responsibilities. The increases in the FY 1999 budget for ADA enforcement at the EEOC and the Department of Justice were badly needed. Even with these increases, more resources are needed to enable the agencies to hire additional personnel, and provide increased staff training, and to support the development and maintenance of information management systems and other technology in the agencies. Congress must allocate additional resources with clear funding direction that would strengthen the agencies' capacity for more effective, efficient, and timely enforcement of ADA. Increased resources devoted to ADA enforcement would mean that more cases could be opened for investigation and litigation; that regulations, subregulatory guidance, and technical assistance materials could be developed more expeditiously and on a broader scale; that more compliance reviews could be conducted; and that systems improvements could be introduced that would lead to better tracking of complaints and referrals, more useful enforcement data, and quicker responses to complainants.

To reinforce the principles of ADA and to clarify the interpretation of key provisions of the law, the federal enforcement agencies need to pursue strategic litigation more vigorously. Federal agencies should also increase their use of strategic litigation and class action cases to bring broad sectors of employment, large employers, and large corporate providers of public accommodations into ADA compliance.

Federal agencies must also exercise strong oversight of the mediation process and ensure that complainants' rights are protected. Such oversight should focus on ensuring that agreements do not violate the requirements of ADA and on the competence of the mediators, both at mediation and with respect to disability issues and ADA. A systematic study should be conducted on how the mediation of ADA cases is working. A cadre of trained and paid mediation support personnel whose task is to help the complainant through the process of mediation should be developed. The enforcement agencies should adopt standards along the lines of the ADA Mediation Guidelines (see Appendix C) to govern mediation of ADA disputes.

Federal enforcement agencies should ensure that staff members are knowledgeable and current on matters relating to ADA enforcement. Staff training, a key method for ensuring that staff are knowledgeable, has occurred and is continuing to occur, especially at the EEOC. However, training that follows up, refreshes, or updates earlier training is needed. In some of the Title II referral agencies, the legal expertise of the investigative and legal staff with respect to ADA jurisdictional issues also needs to be improved. Many of the DOT operating administrations, especially, need to provide training in various areas, including investigation, legal jurisdictional issues, ADA, and disability issues.

The federal enforcement agencies should engage in more outreach, training, and collaboration with the disability community.

Increased outreach to the disability community—people with disabilities and the disability advocacy and legal communities—is required. The enforcement agencies all have some relationship with the disability community, but they would benefit from greater input from these groups in setting their priorities for policy development and litigation, in determining feasible accommodations, and in identifying areas in which additional agency staff training would be helpful. The enforcement agencies should engage in structured collaboration with private attorneys specializing in disability law to advance the litigation activities of the agencies. Follow-up, refresher, or updated training of the disability community should be provided by all the enforcement agencies.

Federal enforcement agencies should make a concerted effort to develop and effectively disseminate public education materials geared to the unique needs of many of the constituent groups within the disability community. Many more materials that effectively accommodate the needs of people with disabilities from diverse cultures and people with mental disabilities are needed to improve general awareness among these groups of their rights and how to exercise them. Information dissemination strategies must accommodate the limited contact with the outside world available to people living in institutions, especially people with mental disabilities, for effective outreach to these populations.

The Department of Justice, the Equal Employment Opportunity Commission, and the other federal agencies charged with ADA enforcement should promote proactive messages for media coverage of ADA.

> The enforcement agencies should embark on a proactive public educational media campaign for ADA. Such a campaign does not require that the agencies "take sides" in a fashion inappropriate for an enforcement agency. It does mean making use of the media to more clearly explain the requirements of ADA, its rationale, and the ways in which ADA protections are a benefit to us all. The campaign must also include strategies to respond to inaccurate and misleading negative portrayals of ADA in the media.

Conclusion

ADA's comprehensive national mandate for the elimination of discrimination based on disability raises the expectation that the "full force of the federal law will come down on anyone who continues to subject persons with disabilities to discrimination by segregating them, by excluding them, or by denying them equally effective and meaningful opportunity to benefit from all aspects of life in America."[12] The National Council on Disability understands its statutory mission to monitor the implementation, effectiveness, and impact of ADA in light of this mandate. As the Supreme Court prepares to address the constitutionality of ADA, it is more important than ever that federal agencies charged with the law's enforcement come together in a unified strategy to protect and advance ADA.

As the nation approaches the upcoming presidential elections in the fall of this year, it is with a greater awareness than ever of disability and its impact. The disability community as a whole is a more informed constituency, more keenly aware of its right to equality of opportunity under the law. This report provides a blueprint for the next administration to remedy the shortcomings that have hindered ADA compliance and enforcement until now. NCD stands ready to work with our sister agencies and other stakeholders inside and outside the government to develop that strategy. Indeed, throughout the preparation of this report, federal agencies have shown great willingness to collaborate with NCD in advancing the broad and enlightened enforcement of ADA. Together, as we stand at the dawn of a new century, let us recommit to the vision of an America that keeps its promise of "liberty and justice for all."

Endnotes

1. Americans with Disabilities Act, 42 U.S.C. 12101(b)(3).

2. Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 *Temp. L. Rev.* 393, 469 (Summer 1991).

3. Id. at 397.

4. 42 U.S.C. §12101(a)(6). For a discussion about the problems with and limitations on census data regarding people with disabilities, see National Council on Disability, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities—With Legislative Recommendations*, February 1986, at 3–5. The "national polls" reference is primarily to polls conducted by Louis Harris and Associates. In 1986, the Harris organization undertook the first-ever nationwide telephone poll of persons with disabilities. Louis Harris & Assocs., The ICD Survery of Disabled Americans: Bringing Disabled Americans into the Mainstream (1986).

5. 42 U.S.C. §§12101(a)(2) and (3).

6. 42 U.S.C. §12101(a)(4).

7. 42 U.S.C. §12101(a)(9).

8. National Council on Disability, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities—With Legislative Recommendations*, February 1986, p. 12.

9. See S. Rep. No. 116, 101st Cong., 1st Sess. 101 (1989) at 16–18.

10. 42 U.S.C. §12101(b). *Cf. Toward Independence*, pp. 18–19.

11. National Council on Disability, *Achieving Independence: The Challenge for the 21st Century*, July 26, 1996, pp. 155, 157.

12. 135 Cong. Rec. S4984 (daily ed. May 9, 1989) (statement of Sen. Harkin).

1. INTRODUCTION

1.1 Background

This report on federal enforcement of the Americans with Disabilities Act (ADA) is a product of the Disability Civil Rights Monitoring Project, a policy initiative of the National Council on Disability (NCD). It is responsive to the NCD interest in fostering effective enforcement of existing disability civil rights laws and its statutory responsibility to monitor the effectiveness of ADA implementation by examining how the various federal agencies are implementing their enforcement responsibilities under ADA.[1]

The impetus for this project grew from the 1996 National Summit on Disability Policy, where a diverse group of disability community leaders from across the country recommended that NCD:

- work with the responsible federal agencies to develop strategies for greater enforcement of existing disability civil rights laws "consistent with the philosophy of " ADA[2]
- continue working "toward elimination of contradictory laws, regulations and programs [and]...promote coordination and commonality of goals across agencies"[3]

NCD responded to these directives with a request for proposals (RFP) to assess the federal government's compliance, enforcement, and public information efforts regarding ADA, Part B of the Individuals with Disabilities Education Act (IDEA), the Fair Housing Act as amended by the Fair Housing Amendments Act of 1988 (FHAA), and the Air Carrier Access Act (ACAA). In response to the RFP process, NCD selected the Disability Rights Education and Defense Fund (DREDF) to assess and report on federal enforcement of each of the four laws and on the cumulative impact of federal enforcement of all four laws.

1.2 Purpose of the Report

This report describes federal compliance, enforcement, technical assistance, and public information activities for the four main titles of the Americans with Disabilities Act. It also assesses the effectiveness of these activities. Specific areas of attention include:

- complaint processing methodologies and their outcomes
- proactive compliance activities
- regulatory and policy development activities
- litigation activities and the focus and impact of litigation choices
- administrative organization for enforcement
- staff training for ADA enforcement
- technical assistance activities and public information aimed at covered entities and at people with disabilities
- leadership in addressing key issues of ADA interpretation and enforcement as new issues surface and in response to the interests and needs of the disability community

1.3 Scope of the Report

This report addresses federal enforcement of ADA as carried out by four key federal agencies: the Department of Justice (DOJ), the Equal Employment Opportunity Commission (EEOC), the Department of Transportation (DOT), and the Federal Communications Commission (FCC). It also addresses briefly the ADA technical assistance activities of three additional agencies: the Architectural and Transportation Barriers Compliance Board (Access Board), the National Institute on Disability and Rehabilitation Research (NIDRR) and the Disability and Business Technical Assistance Centers (DBTACs) that it funds, and the President's Committee on the Employment of People with Disabilities (PCEPD). The report focuses on Titles I-IV of ADA and the federal agencies responsible for the enforcement of these titles. It does not analyze implementation of the miscellaneous and technical provisions in Title V of ADA.

1.4 Research Approach

Enforcement of ADA is examined from two perspectives. The whole agency approach assesses the effectiveness of each of the federal agencies in achieving the enforcement objectives for which each of them is responsible. The whole law approach assesses the overall effectiveness of the collective enforcement activities, as well as the effect of their external coordination and collaboration across agencies within and outside of government.

The research activities for this study included the following:

- identifying the functions and organizational components of each of the four key enforcement agencies
- identifying, collecting, and analyzing data from the complaints filed and processed by the agencies
- identifying, collecting, and analyzing information about agency regulatory and policy development activities
- reviewing and assessing agency documents such as annual reports, task force reports, procedure manuals, and other internal documents
- identifying and collecting information on agency technical assistance activities
- identifying and collecting information on agency training activities
- collecting and classifying the public information materials published and/or distributed by the federal agencies
- conducting interviews with agency staff to understand the agency processes for complaint handling, litigation activities, and the development of policy guidance
- conducting interviews with persons outside the enforcement agencies—people with disabilities, private attorneys, and advocates—who have utilized the federal enforcement mechanisms to obtain a consumer's perspective

At the time the research team was conducting its research for this report, the U.S. Commission on Civil Rights was completing two evaluation reports, on Title I and Title II of ADA. At the urging, in particular, of the EEOC, the Civil Rights Commission shared with the research team some of the data and other materials it had gathered. In an effort to not unnecessarily duplicate efforts, information, data, and interviews from the Commission's published reports are cited as well, since these comprise important additional sources of information.

1.5 Report Structure

This report is presented in 11 chapters. This chapter, Chapter 1, provides introductory information about the purpose, scope, and content of the report; and about the history, structure, and enforcement processes of ADA. Chapter 2 examines ADA enforcement activities of the Department of Justice, including its regulatory activities, and its performance in processing complaints under Title II and Title III and in pursuing litigation under Titles I, II, and III. Chapter 3 assesses the activities of the EEOC in pursuing its regulatory and enforcement responsibilities for Title I. The Department of Transportation, which has specific regulatory and enforcement responsibilities under Titles II and III, is the focus of Chapter 4. Chapter 5 assesses enforcement of Title IV by the FCC. The standard-setting activities of the Access Board are discussed in Chapter 6. The technical assistance activities of NIDRR and the President's Committee on the Employment of People with Disabilities and the public information and technical assistance materials distributed by these agencies are the focus of Chapters 7 and 8. Chapter 9 discusses the media presentation of ADA and its relationship to enforcement issues. Stakeholder views of ADA enforcement are presented in Chapter 10. A summary assessment of the findings is presented in the final chapter.

This report also includes six appendices. Appendix A is a complete list of all the findings and recommendations contained in this report, across all the agencies, grouped by agency, or, in the case of the Department of Transportation, by the individual operating administrations within the Department. Appendix B contains a detailed summary of the provisions of all five titles of ADA. Appendix C contains ADA Mediation Standards. Appendix D is a list of persons interviewed for this report. Appendix E presents a description of the Milwaukee County experience with a Voluntary Compliance Agreement from the perspective of a community member. Appendix F is a glossary of acronyms used in the report.

1.6 Brief History and Context of the Americans with Disabilities Act

On July 26, 1990, the Americans with Disabilities Act of 1990 (ADA), the most comprehensive civil rights advancement for people with disabilities ever to be enacted by the United States Congress, was signed into law by President George Bush.[4] ADA originated as a proposal of the National Council on Disability. The development and enactment of the legislation is described in some detail in NCD's report *Equality of Opportunity: The Making of the Americans with Disabilities Act*;[5] the following is a brief summary of some of the high points.

In 1984, Congress established NCD as an independent federal agency[6] and charged it with reviewing federal laws, regulations, programs, and policies affecting people with disabilities to assess the effectiveness of such laws, regulations, programs, and policies in meeting the needs of individuals with disabilities, and making recommendations to the president, Congress, officials of federal agencies, and other federal entities regarding ways to better promote equal opportunity, economic self-sufficiency, independent living, and inclusion and integration into all aspects of society for Americans with disabilities.[7]

NCD was specifically charged with issuing, by February 1986, a report to the president and Congress analyzing federal laws and programs and presenting legislative recommendations to address shortcomings identified. Before issuing this report, NCD convened consumer forums in all 50 states and the U.S. territories; participants in these forums repeatedly told NCD that the most pervasive and recurrent problem faced by people with disabilities was unfair and unnecessary discrimination.

In response to its statutory mandate, NCD published *Toward Independence*, a report to the president and Congress, in January 1986. In the report, NCD presented 45 legislative recommendations in 10 broad topic areas. The first recommendation was that

> Congress should enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap.

NCD suggested that the proposed statute should be named the Americans with Disabilities Act.[8]

Subsequent recommendations in the report described what should be included in such a statute.[9] Relying on the findings and evidence of the Commission on Civil Rights in *Accommodating the Spectrum,* the report spotlighted the pervasiveness of discrimination on the basis of disability and the need for a comprehensive statute prohibiting such discrimination.[10]

In its 1988 follow-up report, *On the Threshold of Independence,* NCD fleshed out its concept of ADA by publishing its own draft bill.[11] With a few changes,[12] NCD's draft bill was introduced in the Senate on April 28, 1988, and in the House of Representatives on April 29, 1988.[13] Joint congressional hearings on the bills were held in September 1988, but, when the 100th Congress expired a couple of months later, no action had been taken on the proposed legislation.

A revised ADA bill,[14] sponsored by Senator Tom Harkin (D-Iowa) in the Senate and Representative Tony Coelho (D-CA) in the House of Representatives, was introduced in the 101st Congress on May 9, 1989.[15] On August 2, 1989, the Senate Committee on Labor and Human Resources reported unanimously a substitute bill reflecting certain compromises and clarifications arrived at through negotiations between the Bush Administration and Senate sponsors of the bill.[16] The Senate passed the bill, with a few floor amendments, by a vote of 76 to 8 on September 7, 1989.[17] The House Committee on Education and Labor reported out a substitute bill incorporating the Senate changes and other clarifying language, by a vote of 35 to 0, on November 14, 1989.[18] Subsequently, the three other House committees to which the bill was assigned—Public Works and Transportation,[19] Energy and Commerce,[20] and Judiciary[21]—reported out ADA bills. On May 22, 1990, the House passed a consolidated version of the bill by a vote of 403 to 20.[22]

After two different conferences on the bill finally succeeded in working out differences between the Senate and House versions,[23] the House approved the final version of the bill by a vote of 377 to 28 on July 12, 1990,[24] and the Senate, with a similarly overwhelming majority of 91 to 6, passed the bill on July 13, 1990.[25] In addition to NCD's *Equality of Opportunity* report, a variety of other publications describe various details of the events surrounding ADA's introduction, and congressional consideration and passage of the legislation.[26]

In a broader sense, the history of ADA did not begin in 1988 when the first bill was introduced in Congress. Rather, the disability rights movement had paved the way for the law's enactment during the preceding several decades by advocating for an end to historic practices of isolation, segregation, and exclusion of people with disabilities from schools, jobs, and community life. In the early 1970s, advocates began to go to court to challenge practices that kept people with disabilities from participating in programs, activities, and opportunities that other members of society took for granted.

A profound shift in disability public policy took place in 1973 with the passage of Section 504 of the 1973 Rehabilitation Act. Section 504, modeled after earlier laws prohibiting discrimination based on race, sex, and ethnic origin, forbade entities receiving federal financial assistance from discriminating on the basis of disability.

Before the passage of Section 504, exclusion and segregation of people with disabilities was not considered discriminatory under federal statutory law. Disability public policy had been based on the assumption that the problems faced by people with disabilities, such as unemployment and lack of education, were inevitable consequences of the physical or mental limitations imposed by the disability itself. Enactment of Section 504 showed Congress's recognition that the inferior social and economic status of people with disabilities was not a consequence of the disability itself but instead was a result of societal attitudes, barriers, and prejudices. As with racial and gender discrimination, Congress recognized that legislation was necessary to eradicate disability-based discriminatory policies and practices.

During the 1980s, the disability community also succeeded in getting other important disability rights laws enacted. Federal legislation was passed banning discrimination against people with disabilities by airlines, establishing the right to sue states for violations of Section 504 and the right of parents to recover attorney fees under the Education for All Handicapped Children Act (since renamed the Individuals with Disabilities Education Act, or IDEA), and prohibiting discrimination in housing. Despite these important legislative advances, people with disabilities still lacked a coherent national policy guaranteeing the same protection from discrimination as that available on the basis of race, ethnicity, gender, and religion; thus, ADA was needed.

In the years since its enactment, the extent to which people with disabilities perceive that ADA has been effective in challenging discrimination and eliminating architectural, communication, and policy barriers reflects, to a significant extent, the federal government's leadership in implementing and enforcing the law. The difficult job of conceptualizing, crafting, and enacting the landmark legislation took place more than a decade ago. The equally difficult task of monitoring and ensuring effective, consistent, and timely enforcement and implementation of ADA continues, and is the subject of this report.

1.7 Structure, Organization, and Enforcement Authority of ADA

ADA contains five titles.

- Title I: Employment—affecting employers having 15 or more employees
- Title II: Public Services—affecting all activities of state and local governments, with Subtitle B applicable to transportation provided by public entities
- Title III: Public Accommodations and Services Operated by Private Entities—affecting privately operated public accommodations, commercial facilities, and private entities offering certain examinations and courses
- Title IV: Telecommunications—affecting telecommunication relay services and closed captioning
- Title V: Miscellaneous Provisions—including the relationship of ADA to other laws, the requirements for technical assistance, the role of the Architectural and Transportation Barriers Compliance Board, the coverage of Congress, and some additional definitions regarding coverage.

Enforcement responsibility for Title I (employment) rests primarily with the EEOC, although the attorney general also has certain responsibilities. The enforcement authority of Title I is structured to correspond to the powers, remedies, and procedures that are set forth in Sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964. In addition, ADA requires coordination between the authorities enforcing Title I and enforcement under the Rehabilitation Act of 1973 performed by the Office of Federal Contract Compliance Programs of the U.S. Department of Labor. In addition to federal agency enforcement, Title I affords individuals a private right of action.

ADA provides enforcement processes under Title II as to state or local government entities that correspond to the remedies and procedures in Section 505 of the Rehabilitation Act of 1973. The Department of Justice is responsible for issuing the implementing regulations for Subtitle A of Title II (all activities of state and local government except transportation); however, the processing of complaints under Title II is spread among the Department of Justice and seven other "designated" cabinet-level agencies. Regulations for Subtitle B, involving transportation, are the responsibility of the Department of Transportation. DOT is also the designated agency for complaints involving public transportation. The designated agencies all have authority under the Rehabilitation Act to investigate, resolve, and litigate complaints that fall under Section 504. Because of the overlap between ADA Title II complaints and complaints filed under Section 504 of the Rehabilitation Act, cases litigated by these agencies may be dually considered Section 504/ADA. However, Title II of ADA also places responsibility for litigation with the Department of Justice. Not only is DOJ to engage in litigation of the complaints that fall under its own jurisdiction, but it can litigate complaints considered by a designated agency that, following an investigation and a cause finding, are referred to DOJ for litigation. Individuals also have a private right of action under Title II.

Federal enforcement of Title III rests solely with DOJ. The remedies and procedures are those set forth in Section 204(a) of the Civil Rights Act of 1964. The attorney general is charged with the duty to investigate alleged violations of Title III and undertake periodic reviews of compliance of the covered entities. Where a violation is found that indicates a pattern or practice or an issue of general public importance, the attorney general is authorized to seek enforcement through a civil action in U.S. District Court. Individuals also have a private right of action under Title III.

The Federal Communications Commission is charged with the responsibility for enforcement of Title IV (telecommunications). Complaints under Title IV that involve intrastate telecommunications are to be referred to the particular state for handling. The FCC can reassert jurisdiction over such complaints only if the state has taken no action after 180 days or the state is no longer qualified for certification from the FCC.

Title V, with a number of different definitional and other miscellaneous provisions, does not establish any distinct enforcement structures. Some of the provisions do not require the articulation of enforcement; others (e.g., provisions for retaliation) refer enforcement to the first three sections of ADA. The enforcement procedures for the Senate and the House of Representatives are those adopted by the bodies for discrimination charges based upon race, color, religion, sex, national origin, or age.

The above paragraphs summarize briefly the enforcement structure of each title of ADA. A more detailed description of the content of each title, including its enforcement provisions, can be found in Appendix B. The four chapters that follow describe in detail the organizational structure and processes that have been developed by the Department of Justice, the Equal Employment Opportunity Commission, the Department of Transportation, and the Federal Communications Commission to implement their enforcement responsibilities.

1.8 Elements of Civil Rights Enforcement

Ideally, the performance of the agencies charged with enforcement of ADA should be judged against a standard of what constitutes a good or effective job of civil rights enforcement. In the absence of such a standard, potential elements of a model of effective civil rights enforcement have been identified, derived inductively from the evaluation findings. Further study would be helpful to elaborate the content of these elements and to prioritize them. In addition, examination of the enforcement of other civil rights laws, such as the 1964 Civil Rights Act that covers discrimination based upon race, color, national origin, religion, and sex, would provide further information about the elements of effective enforcement. Eventually, these elements could be used to develop criteria to assess effective civil rights enforcement.

Element 1. Proactive and reactive strategies. Proactive measures address compliance through efforts to educate, monitor, and prevent civil rights violations, and reactive measures aim to resolve and remedy complaints of civil rights violations after the fact.

Element 2. Communication with consumers and complainants. Communication must ensure that persons protected by the statute know where and how to file complaints of discrimination, how the enforcement agency operates, what to expect as possible outcomes, and the aims and limits of the enforcement mandate. Complainants should hear promptly from the agency following the initial filing and be regularly updated on the status of the complaint.

Element 3. Policy and subregulatory guidance. Enforcement is advanced where agencies issue policy and subregulatory guidance on issues of confusion or controversy as a means of providing advice to covered entities about actions for compliance and to assist the courts in the interpretation of the statute.

Element 4. Enforcement actions. Where violations of the statute are present, effective enforcement involves measures to obtain corrective action or mediated settlement, followed by more punitive measures such as fines or litigation where violations are not easily or promptly resolved.

Element 5. Strategic litigation. Agency-initiated strategic litigation or amicus participation in litigation to implement enforcement is used where other measures have failed or to develop case law.

Element 6. Timely resolution of complaints. Effective resolution of complaints involves their timely processing. There should be expeditious internal processing where complaints must be referred to other agencies for investigation.

Element 7. Competent and credible investigative processes. Effective enforcement includes investigative processes and outcomes that are thorough, well-documented, and competent and thus credible to complainants and covered entities alike.

Element 8. Technical assistance for protected persons and covered entities. Technical assistance, offered in a variety of modes and formats, assists covered entities and informs those protected by the statute of their rights.

Element 9. Adequate agency resources. Resources include agency staff (investigators, attorneys, and others) adequate in number to the size of the compliance and complaint caseload; ongoing staff training provided on a regular basis; and data management systems and other support systems to enable efficient implementation of enforcement activities.

Element 10. Interagency collaboration and coordination. Appropriate collaboration and coordination affects enforcement where responsibilities are spread across different agencies or organizations, or where there are related activities or areas of jurisdiction.

Element 11. Outreach and consultation with the community. Regular outreach and consultation with the communities of persons protected by the statutes provide information about the key issues and problem areas of enforcement, how effectiveness is judged by consumers, and potential methods for improvement.

This report uses these elements to examine ADA enforcement. What enforcement should look like, specifically, varies by agency. Performance is examined qualitatively in each of these areas; where data permitted, quantitative indicators of performance are also included.

NCD hopes that the description of the performance of the federal ADA enforcement agencies and the recommendations for improving future performance presented in this report will serve as a useful roadmap for those agencies, NCD, the disability community, and leaders in the executive and legislative branches of the Federal Government to work together to ensure maximally effective enforcement of the Americans with Disabilities Act.

Endnotes

1. 42 U.S.C. § 12206.

2. National Council on Disability, *Achieving Independence: The Challenge for the 21st Century, A Decade of Progress in Disability Policy, Setting an Agenda for the Future*, July 26, 1996, p. 155.

3. National Council on Disability, p. 155.

4. The Americans with Disabilities Act of 1990, Public Law 101-336, 101st. Cong., 2nd sess., July 26, 1990.

5. National Council on Disability, *Equality of Opportunity: The Making of the Americans with Disabilities Act (1997).*

6. The Council was initially named the National Council on the Handicapped. Its name was changed to the National Council on Disability in 1988. Pub. L. No. 100-630, tit. II, § 205(a), 102 Stat. 3310 (1988).

7. Pub. L. No. 98-221, tit. I, § 142, 98 Stat. 27 (1984) (codified as amended at 29 U.S.C. § 781).

8. *Toward Independence* at 18.

9. See id. at 19–21.

10. See id., App. at A-3 to A-4.

11. National Council on the Handicapped, *On the Threshold of Independence* 27–39 (Andrea H. Farbman, ed., 1988).

12. The nature of such changes and the circumstances surrounding the Council's decision to agree to the changes is described in National Council on Disability, *Equality of Opportunity: The Making of the Americans with Disabilities Act,* 64-66 (1997).

13. S. 2345, 100th Cong., 2d Sess., 134 Cong. Rec. 9379-9382 (1988); H.R. 4498, 100th Cong. 2d Sess.; see 134 Cong. Rec. 9599-9600 (1988) (statement of Rep. Coelho).

14. For a description of changes, see Robert L. Burgdorf, Jr., *"Equal Members of the Community": The Public Accommodations Provisions of the Americans with Disabilities Act,* 64 Temp. L. Rev. 551 & n.77, 556-559 (1991).

15. S. 933, 101st Cong., 1st Sess., 135 Cong. Rec. S4978 (daily ed. May 9, 1989); H.R. 2273, 101st Cong., 1st Sess., 135 Cong. Rec. H1690 (daily ed. May 9, 1989).

16. See S. Rep. No. 116, 101st Cong., 1st Sess. 101 (1989) [hereinafter Senate Report]. The changes made in the substitute bill are discussed at 135 Cong. Rec. S1073–74 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin).

17. 135 Cong. Rec. S10,803 (daily ed. Sept. 7, 1989).

18. H.R. Rep. No. 485, 101st Cong., 2d Sess. pt. 2, at 22 (1990) (Committee on Education and Labor) [hereinafter Education & Labor Committee Report].

19. Reported out on April 3, 1990, by a vote of 45 to 5. H.R. Rep. No. 485, 101st Cong., 2d Sess. pt. 1, at 46, 52 (1990) (Committee on Public Works and Transportation) [hereinafter Public Works & Transportation Committee Report].

20. Reported out on March 13, 1990, by a vote of 40 to 3. H.R. Rep. No. 485, 101st Cong., 2d Sess. pt. 4, at 29 (1990) (Committee on Energy and Commerce) [hereinafter Energy & Commerce Committee Report].

21. Reported out on May 2, 1990, by a vote of 32 to 3. H.R. Rep. No. 485, 101st Cong., 2d Sess. pt. 3, at 25 (1990) (Committee on the Judiciary) [hereinafter House Judiciary Committee Report].

22. 136 Cong. Rec. H2638 (daily ed. May 22, 1990).

23. H.R. Conf. Rep. No. 558, 101st Cong., 2d Sess. (1990); H.R. Conf. Rep. No. 569, 101st Cong., 2d Sess. (1990).

24. 136 Cong. Rec. H4629 (daily ed. July 12, 1990).

25. 136 Cong. Rec. S9695 (daily ed. July 13, 1990).

26. See, e.g., Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act,* 64 Temp. L. Rev. 387 (1991); Robert L. Burgdorf, Jr., *History,* in A Bureau of Nat'l Affairs Special Report—The Americans with Disabilities Act: A Practical and Legal Guide to Impact, Enforcement, and Compliance at 9–31 (1990); Chai R. Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside,* 64 Temp. L. Rev. 521, 523–31 (1991); A Bureau of Nat'l Affairs Special Report—The Americans with Disabilities Act: A Practical and Legal Guide to Impact, Enforcement, and Compliance 35–62 (1990); Nancy Lee Jones, *Overview and Essential Requirements of the Americans with Disabilities Act,* 64 Temp. L. Rev. 471, 472–75 (1991).

2. DEPARTMENT OF JUSTICE

2.1 Organization and Structure

The Department of Justice (DOJ) has broad responsibility for the enforcement of ADA, just as it has ultimate responsibility for the enforcement of many other federal laws (see Figure 2-1). Under ADA, the DOJ has authority for litigating discrimination cases involving state or local government employment, whether filed under Title I or Title II. The EEOC is responsible for investigating Title I charges, but where a Title I charge relates to state or local government employment, the EEOC refers charges to DOJ after investigation and a failure to conciliate by an EEOC regional or local office. The Department then decides whether to reopen the case for investigation, issue a right-to-sue letter, or initiate settlement discussions or undertake litigation of those matters.

The DOJ has specific and primary responsibility for the enforcement of Title II, affecting all activities of state and local governments, and of Title III, which applies to privately operated public accommodations, commercial facilities, and private entities offering certain examinations and courses. As ADA gives primary responsibility for Title I enforcement to the Equal Employment Opportunity Commission, and DOJ's activity under Title I is limited, the enforcement activities of the Department of Justice with respect to Titles II and III are the primary focus of this chapter.

2.1.1 Structure of Civil Rights and ADA Enforcement

Within the DOJ, the Civil Rights Division has responsibility for the enforcement of the nation's civil rights laws that prohibit discrimination on the basis of race, color, sex, disability, religion, and national origin. The Division is headed by an assistant attorney general, who reports to the associate attorney general. The Civil Rights Division includes 11 sections, of which 10 have substantive enforcement responsibilities. One of these is the Disability Rights Section (DRS), charged with responsibility for enforcement of disability civil rights laws, including ADA and some aspects of Section 504 of the Rehabilitation Act, such as DOJ's obligation, pursuant to Executive Order 12250, to coordinate the implementation and enforcement of Section 504.

The Appellate Section of the Civil Rights Division also has key responsibilities in relation to ADA; it is responsible for handling civil rights cases in the courts of appeals and, in cooperation with the solicitor general, in the Supreme Court. In addition, the Special Litigation Section of the Civil Rights Division has responsibility for enforcement of the Civil Rights of Institutionalized Persons Act (U.S.C. §§ 1997-1997h) and, since 1994, incorporates ADA claims in the cases it pursues; where such overlap with ADA occurs, the Special Litigation Section and DRS may consult and collaborate. Similarly, because of overlap between the Fair Housing Act and ADA, the Housing and Civil Enforcement Section and DRS coordinate their activities when both ADA and the Fair Housing Act are implicated.

2.1.2 Disability Rights Section

The Disability Rights Section is directed by a section chief. A special legal counsel and three deputy chiefs, each with responsibility for a different geographic area of the country, report directly to the section chief. In addition to the offices of the deputies, there are four units within DRS: Technical Assistance, Office Administration, Investigation, and Certification and Coordination.

The entire staff of DRS is located in Washington, D.C.; there are no regional or district offices. However, since 1995, over half of the U.S. attorneys have been involved in the handling and resolution of Title II and Title III charges, thus spreading the processing of discrimination charges beyond the Washington offices of DRS. Additionally, mediators funded by DRS to facilitate charge resolutions are located throughout the nation.

Major responsibilities and activities of DRS are the following:

- Investigation and settlement of discrimination complaints filed under Titles II and III of ADA

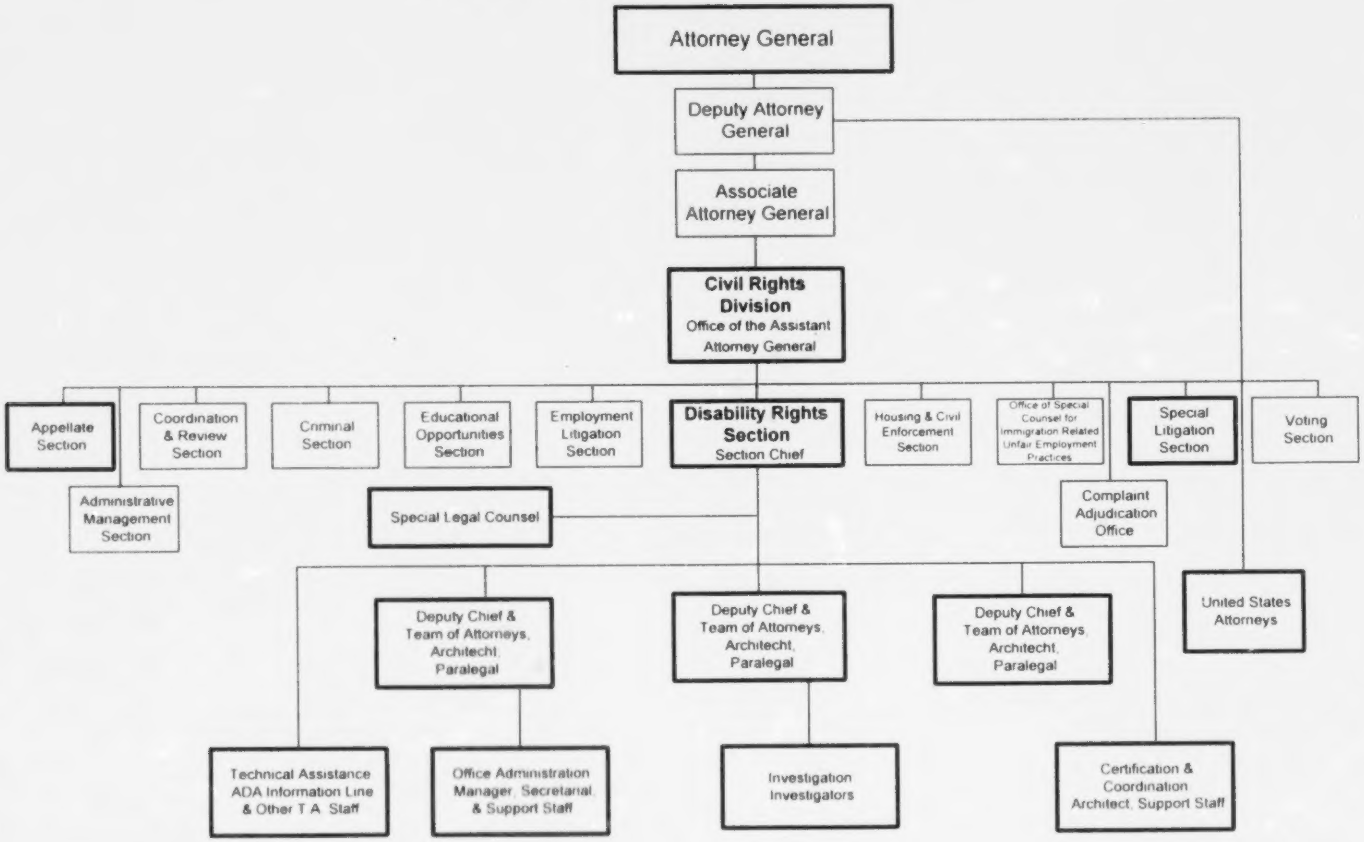
- Litigation under Titles II and III of ADA
- Litigation against public employers under Title I following referral from the EEOC or under the attorney general's authority for pattern or practice litigation
- Certification of voluntarily submitted building codes from state and local governments for equivalence with ADA Accessibility Standards
- Dissemination of technical assistance information and coordination of the technical assistance of other federal agencies
- Coordination of the administrative enforcement of Title II of ADA and Section 504 of the Rehabilitation Act by other federal executive agencies
- Continuing development of the regulations implementing Title II (Subtitle A) and Title III
- Representing the assistant attorney general as a member of the Architectural and Transportation Barriers Compliance Board (Access Board)
- Implementing section 508 of the Rehabilitation Act by

  1) developing and implementing a continuing process through which federal agencies may assess the extent to which their use of electronic and information technology is accessible to people with disabilities; and

  2) preparing periodic reports to the president and Congress that contain "information on and recommendations regarding the state of Federal department and agency compliance" with Section 508.

Figure 2-1

Department of Justice Enforcement of ADA


Attorney General
Deputy Attorney General
Associate Attorney General
Civil Rights Division
Office of the Assistant Attorney General
Appellate Section
Administrative Management Section
Coordination & Review Section
Criminal Section
Educational Opportunities Section
Employment Litigation Section
Disability Rights Section
Section Chief
Housing & Civil Enforcement Section
Office of Special Counsel for Immigration Related Unfair Employment Practices
Complaint Adjudication Office
Special Litigation Section
Voting Section
Special Legal Counsel
United States Attorneys
Deputy Chief & Team of Attorneys, Architecht, Paralegal
Deputy Chief & Team of Attorneys, Architecht, Paralegal
Deputy Chief & Team of Attorneys, Architecht, Paralegal
Technical Assistance ADA Information Line & Other T.A. Staff
Office Administration Manager, Secretarial, & Support Staff
Investigation Investigators
Certification & Coordination Architect, Support Staff

Note: Offices with bold outline have ADA enforcement responsibility. Not all of the offices and divisions of the Department of Justice are pictured in this figure.

2.1.3 Budget and Staffing

The total budget of the Disability Rights Section is $10.8 million for fiscal year (FY) 1999. This includes an increase over FY 1998 of $1 million; Congress authorized the increase specifically for ADA enforcement and mediation activities (approximately $500,000 for each). DRS is using the $500,000 increase to hire attorneys and investigators.

The availability of resources is an important factor in decisions regarding enforcement actions, technical assistance, policy development, and data reporting systems. Increased resources would mean that more cases could be opened for investigation and litigation; that regulations, policy guidance, and technical assistance materials could be developed more expeditiously and on a broader scale; and that systems improvements could be introduced that would lead to better tracking of complaints and referrals, more useful enforcement data, and quicker responses to complainants. Effects of resource limitations are discussed in section 2.11.1 of this chapter. President Clinton has recognized the urgent need for expanded resources and called for an additional $2.4 million for ADA enforcement, including 29 new positions (a 35% increase), in the FY 2001 budget. Action by Congress to adopt this significant budget increase will help ensure that the shortcomings and problems identified in this report will be ameliorated.

The staff of DRS consists of attorneys, paralegals, investigators, architects, staff specialists for technical assistance functions, and secretarial support staff. The Enforcement Unit, consisting of three litigation teams, has 30 staff members, with each team containing six or seven lawyers, an architect, a secretary, and a paralegal. The Investigations Unit, with one team of DOJ employees and one team of contract employees, has 20 staff members. Most of these are investigators, along with some support staff; although several of the investigators happen to be attorneys, they do not function as attorneys. The Technical Assistance Unit consists of 20 professional and clerical staff members. Among the professional staff are an accessibility specialist/architect, program analysts, and specialists in accessibility and equal opportunity. Finally, the Certification Unit contains eight persons, including two attorneys, program and code specialists, an architect (part-time), and support staff.

Including the section chief, the special legal counsel, and the deputies, who are all attorneys, there are 82 FTEs assigned to ADA enforcement in the Disability Rights Section. Approximately 40 percent of DRS staff time is devoted to Title II technical assistance and enforcement, with 60 percent of staff time devoted to Title III enforcement and technical assistance and Title I enforcement.[1]

Some members of the staff of DRS worked in other units within the Department of Justice before transferring into DRS. Some of these staff members were previously unfamiliar with disability civil rights law (e.g., Sections 503 and 504), with disability issues, and with the disability community. However, almost all of the key staff members, including the section chief, the deputy section chiefs, the special legal counsel, and other key managers, had considerable experience with disability issues and disability law. Four of the architects in key roles also had expertise in architectural issues related to accessibility before joining the staff of DRS.

Staff members of DRS report that the section is understaffed in many areas of its responsibility, with significant operational consequences. A shortage of staff has been cited as a factor in such decisions as not to open for investigation a large proportion of Title III complaints received and not to request information from other federal agencies about the Title II complaints that they handle, and as a reason for delays in DOJ promulgation of standards based upon guidelines issued by the Architectural and Transportation Barriers Compliance Board.

2.1.4 Administrative and Organizational Issues

As part of this report's pursuit of a "whole agency" approach, the researchers sought to determine how DOJ's internal operations function in practice—to gain insight into DRS's day-to-day operations. Accordingly, researchers conducted interviews with a number of staff members in various positions throughout the section. At times, serious differences of opinion were uncovered between the views of some staff members and those of management personnel as to how well internal processes were operating. Several issues were identified more than once by different staff members in separate interviews as factors that, from their perspectives, impede the section's overall timely and efficient functioning. One factor repeatedly cited was the many levels of staff and supervisory approval and consultation required before a final decision is made.

In the normal course of DRS operations, many decisions involving a case—whether they involve the complaint investigation, a settlement before a finding, a formal finding, the preparation for litigation, a settlement before litigation, or the decision to litigate (as plaintiff, intervenor, or amicus), are subject to multiple levels of review. To explain how this multiple review process operates, examples mentioned include the following:

- There is significant involvement of supervising attorneys, deputies, the special litigation counsel, the section chief, and the assistant attorney general's office at virtually every stage of all cases.
- A chain of review exists in which even minor and routine briefs and memoranda face review by as many as seven managers, and outgoing correspondence by one or more managerial-level persons.
- Many decisions in DRS require the concurrence of all three deputy section chiefs.

The levels of review and consultation restrict the autonomy of investigators and trial attorneys to act in carrying out their responsibilities. A number of DRS staff members interviewed indicated that, in their experience, the intensity of supervisor scrutiny and multiple levels of sign-off in DRS are far more extensive than in other sections of the Civil Rights Division and elsewhere in the Department of Justice.

Some staff members also reported that they were not present at meetings at which cases they were handling were discussed, and suggested that they were being sidestepped because of their stances on advocacy issues regarding the cases. DRS responded that cases are discussed in a variety of settings and that it is neither possible nor a prudent use of attorneys' time to have them attend all such discussions; DRS provided assurance that DRS's policy is that line attorneys are present at meetings where policy decisions about their cases are made and that line attorneys are present at discussions of cases with the assistant attorney general.

While the intensive involvement of upper-level managers mentioned previously means that they are all thoroughly knowledgeable about the cases before the section, it also raises the issues of unnecessary delay and duplication of effort. The levels of review as described by staff members are formidable both in regard to their height, (i.e., how high in the organizational hierarchy decisions are reviewed), and their breadth, (i.e., how many persons at a particular level need to approve). The requirement of multiple-level and multiple intra-level approvals has timing, personnel resource, and substantive consequences. Because litigation and policy decisions and documents are subjected to such intense supervisory review, it often takes considerable time to obtain the requisite prior approval; the result is delay in taking actions.

"Taking forever to do things" is one of the most frequently heard outside criticisms of DOJ's performance in regard to ADA enforcement. The features of the DRS approval process reported by staff members appear to have some bearing on why the agency is often so slow-moving. In the context of insufficient numbers of staff members to fully perform the section's responsibilities, the multiple-approval process compounds the problem. By requiring front-line staff to spend considerable time and effort seeking to satisfy each of the various managers having sign-off authority, and by delaying them from taking action until this cumbersome process is complete, the efficiency of the inadequate numbers of staff is further hampered.

The potential impacts of this process on the effectiveness of enforcement are great. Most important is that too many of DRS's person hours are spent on internal decision making and not enough in taking action to achieve ADA compliance in the outside world. Another more subtle, but no less far-reaching, potential impact is the pressure on attorneys to propose primarily actions likely to garner easy approval by multiple supervisors without all of them having to assent to all the complexities and nuances that might inhere in less facile proposed actions. This "path of least resistance" approach can result in a tendency toward timidity or wariness—an inclination to avoid thorny and controversial matters and to tackle only the "sure things."

In an official response to a review draft of this report, DOJ offered a different perspective on this purported problem of too many layers of review and too little autonomy of front-line staff. DOJ disagrees with the view that the Office of the Assistant Attorney General for Civil Rights (AAG) is deeply involved at virtually every stage of all cases. Rather, the official role of the AAG's office is to review requests for litigation, requests for amicus participation, and regulatory matters, and to be involved in major policy decisions and strategic planning and priority setting. The Department does agree that all final decisions regarding a case require a complete review but says this does not mean that nearly all decisions involving a case require multiple layers of review.

The DOJ disagrees with the view that investigators and trial attorneys are accorded little autonomy; instead, according to DOJ, they are accorded different levels of autonomy depending on their experience and expertise and the nature of the case involved. Likewise, according to DOJ, it is not true that all correspondence and investigator settlements must be reviewed by managers; all settlements are reviewed by managers but all correspondence is not.

DOJ indicates further that not all three deputies have to concur on all cases. The Department contends that the implication that the review structure is vertical, involving multiple layers, is incorrect. While there are cases requiring review by the deputies, the special legal counsel, and the section chief, those are normally matters involving policy or ground-breaking litigation. In such instances, DOJ states that the review is conducted simultaneously by the deputies and the special legal counsel and then by the section chief. DOJ points out that one reason DRS may have a different review structure than other sections is that many ADA matters still involve matters of first impression. DOJ also takes issue with any suggestion that the supervisors in DRS are incapable of grasping the complexities and nuances of difficult cases.

NCD believes that the disparity in views between the staff members who raised these concerns and the DOJ reviewers who officially commented on this document indicates, at the very least, a need for clarification throughout the section of what the review structure is and what the criteria are that trigger each level of review. A lack of clarity about the review process and areas of independent action for investigators and trial attorneys could be significantly hampering DRS operations. A review of internal operations should be undertaken to determine how these concerns can be alleviated, where procedures can be streamlined, and how staff can be given the maximum autonomy feasible in carrying out their responsibilities.

Each of the three deputies in DRS has a team of investigators and attorneys. Each team is responsible for the complaints and cases that arise for the set of states assigned to that team. This structure allows for the development of collaborative working arrangements and knowledge of specific geographic areas. However, it sometimes results in an inefficient allocation of staff in situations where there is a big issue or case in one region, and the work is somewhat slower in another. The geographic team structure decreases the ease with which the staff resources of DRS can be reassigned as the workload shifts. This appears to be compounded at times by a sense of competition between deputies and concern about credit for the work, creating a disincentive to sharing resources.

The offices of the various sections of the Civil Rights Division are spread across several office buildings. The Office of the Assistant Attorney General for Civil Rights is located in the main DOJ building. This dispersal tends to separate and isolate disability civil rights from other areas of civil rights enforcement. For example, DRS attorneys have too little sense of how enforcement is structured in the other sections or whether the criteria for settlement versus litigation are equivalent. The physical separation also makes diffusion of disability expertise and sensitivity in the overall Civil Rights Division more difficult.

2.1.5 Findings and Recommendations

Finding 1: Several Disability Rights Section (DRS) staff members interviewed for this report expressed concern about the number of administrative reviews affecting various stages of decision making about cases, the limited autonomy of line professional staff, and the separation of DRS from the main offices of the Civil Rights Division.

Examples of their concerns included the following:

- The delays that result, in part, from the multiple levels of review imposed by the administrative structure on decision making with respect to settlement and litigation;
- Managerial review of settlements and some correspondence that may not be necessary;
- The separation of the physical location of DRS from the main offices of the Civil Rights Division and the Department of Justice, and from most of the other sections in the Civil Rights Division, which hampers collaboration, integration, and understanding of disability issues across the sections of the Civil Rights Division.

Recommendation 1: The management, line attorneys, and other staff members of DRS should conduct a collaborative examination of DRS internal operations to determine how the concerns identified can be alleviated, where procedures can be streamlined, how staff members can be given the maximum autonomy feasible in carrying out their responsibilities to increase performance, and how DRS can ensure that it gets the maximum benefit of the input and abilities of its staff members, including those who have disabilities.

The Civil Rights Division and DRS should consider delegating decision-making authority in some Title I, II, or III cases to lower levels within DRS and should develop criteria for determining the types of cases and decisions that must be approved at higher levels.

Recommendation 2: To the extent feasible, all sections of the Civil Rights Division should be housed in the same physical location in order to increase collaboration across sections and enable the communication of disability issues as part of a shared culture of civil rights. If the division cannot achieve a unified physical location of the sections, it should develop and activate mechanisms to foster cross-sectional interaction and

cross-pollination, and to promote other sections' awareness and understanding of disability issues and sensitivities.

2.2 Regulatory Activities and Policy Development

The regulatory responsibilities of the Department of Justice include issuing regulations for ADA and issuing the technical standards for accessibility based upon guidelines developed by the Architectural and Transportation Barriers Compliance Board: ADA Accessibility Guidelines (ADAAG). DOJ also is charged with the responsibility of certifying that state and local building codes are compatible with ADA standards. Policy development activities include the development of policy statements that provide guidance on the interpretation of legal standards and the use of litigation to articulate policy and legal interpretation.

2.2.1 Regulatory Activities

ADA assigns the Department of Justice the responsibility of issuing regulations for Titles II and III. In compliance with the statutory deadline, DOJ issued Title II and Title III regulations on July 26, 1991.[2] The Title III regulations incorporated ADA Accessibility Guidelines,[3] which establish minimum guidelines for the accessibility of buildings and facilities. ADAAG were developed by the Architectural and Transportation Barriers Compliance Board (Access Board), an independent federal agency given statutory authority for developing these guidelines for subsequent adoption by the standard-setting agencies, DOJ and the Department of Transportation. In addition to having authority to adopt standards based upon the Access Board's guidelines, DOJ and DOT participate as members on the Access Board. Two areas in which the Access Board has developed accessibility guidelines subsequent to the original ADAAG are children's facilities and state and local government facilities. The proposed accessibility guidelines for children's facilities were issued in 1996, and the proposed state and local government guidelines were issued in 1994. In both cases, the guidelines were published in final form by the Access Board in January, 1998. DOJ has yet to issue proposed regulations based on the guidelines, much less final rules. Many parties inside and outside government have expressed frustration at the long time lag before action by DOJ. The long delays mean that facilities across the United States that are built and altered, and that will be covered by the standards once they are formally adopted, can be legally built without complying with the precise specifications of the proposed accessibility standards. In an official response to a review draft of this report, DOJ indicated that its delay in issuing such regulations has not excused covered entities from complying with the ADA requirement that facilities must be accessible, and that in an enforcement action a covered entity would still bear the burden of demonstrating that it had met the accessibility requirement of ADA. The National Council on Disability does not consider that covered entities' compliance with the general accessibility requirement of ADA is a substitute for issuance and enforcement of explicit, detailed standards defining such accessibility precisely as it applies in the specific context of children's facilities and state and local government facilities.

One reason DOJ gives for the delay is that is has not had sufficient staff to process the standards more quickly; some additional staff were purportedly assigned to this task in 1999. DRS indicated in early 1999 that both rules would be published within six months. The section also indicated that the new rules would make Title II's new construction requirements the same as Title III's. Persons outside DOJ expressed skepticism about this timeline, noting that for months they had heard the six-month prediction. The skeptics have been proven correct, as DOJ has not issued either of the two sets of standards, not even as proposed regulations, through the end of 1999 and up to the issuance of this report. (Users of DOJ's ADA Web site can easily be misled by two links on a New or Proposed ADA Regulations page—at www.usdoj.gov/crt/ada/newregs.htm—that appear to be to proposed rules on accessibility standards for "State and Local Government Services" and for "children's facilities." These sites actually contain the original proposed guidelines, published in 1994 and 1996 respectively, that indicate the expectation that DOJ will issue the accessibility standards at a later time.)

DOJ is also planning to review ADA Title II and III regulations within the next year, because the Regulatory Flexibility Act and the Small Business Regulatory Enforcement

Fairness Acts require that all federal agencies review their regulations that have significant economic impact 10 years after they are adopted.[4] Failure to review the regulations at the 10-year point can be used as a defense for noncompliance with agency requirements. DRS also expects that it will need to propose additional revisions to ADA regulations involving the accessibility standards, because the Access Board is currently in the final stages of a major revision of ADAAG. The Access Board published the revised ADAAG in proposed form in November 1999. In an official response to a review draft of this report, DOJ noted that the "new" ADAAG, as proposed, includes the provisions added to the guidelines in 1998, and, thus, the Department's lapse in issuing regulations establishing accessibility standards for children's facilities and state and local government facilities will be cured by the Department's adoption of the revised ADAAG. The time frame for DOJ's adoption of these revisions is not clear. If DOJ is again delayed in adopting these rules, the improved ADAAG will further be delayed in applying to facilities that are built and altered across the United States.

In contrast, the Department of Transportation, which is also mandated to adopt the Access Board's technical standards when they address transportation, always publishes proposed and final regulations simultaneously with the Access Board. DOJ, however, takes the view that it would be inappropriate to commit, in advance, to simultaneous or contemporaneous publication of each Access Board rule. ADA clearly establishes a two-step rulemaking process, with the Access Board developing guidelines that form the basis of a separate rulemaking by the Department. DOJ believes it would be an abdication of the Department's statutory responsibility to commit, in advance, to publication of regulations that have yet to be drafted. The Department plans to continue to consider each rule on its own merits at the time it is published. NCD believes that DOJ should make a much more definitive commitment to prompt issuance of regulatory standards in such circumstances.

2.2.2 Policy Development

The development and articulation of policy positions by the Department of Justice through the Disability Rights Section occurs primarily through the litigation that DRS decides to pursue and through its technical assistance activities. DRS does not issue policy guidance documents similar to those that the EEOC issues.

DRS has initiated the development of a number of documents about ADA. Some of these have been developed in-house, some have been developed by other federal agencies, and some have been developed by industry or community groups as part of a grant from DOJ. Members of the staff of the Disability Rights Section endeavor to review all the developed materials for accuracy and see their targeting of specific audiences for technical assistance materials (e.g., police forces, small businesses) as a way of expressing policy positions. Additionally, as questions come to DRS through its hotline, from members of Congress, from other federal agencies, or by other means, they are often handled by the development of a written letter of reply. These letters can be viewed as policy letters that articulate the DRS position or interpretation on the issue raised. While these letters are not binding, DRS staff members track the letters and try to ensure that there is a consistent response to similar inquiries.[5] DOJ does not publish such letters in any formal way; the DOJ Web site, however, includes a link to "Frequently Requested FOIA-processed Records"[6] that includes "Technical Assistance Letters,"[7] "CORE Letters,"[8] and "Letters of Findings,"[9] in addition to information about ADA settlement agreements.[10] Unfortunately, the Web site contains Technical Assistance Letters only through mid-1998 and Letters of Findings only through mid-1997. The Civil Rights Division has indicated that it will correct this problem soon. During the preparation of this report, DRS updated the Web site file of CORE Letters, so it is current through April 2000. DRS indicates that it is always considering new and innovative ways to disseminate its policy decisions.

The selection of litigation is a key strategy for advancing policy development. The litigation priorities of DRS are discussed in section 2.5, while DOJ policy positions are discussed in section 2.10.

2.2.3 Findings and Recommendations

Finding 2: DOJ provides policy guidance primarily through its litigation and technical assistance activities.

- Guidance is provided by letters issued in response to specific inquiries. Although these express interpretation, they are not binding and do not constitute formal statements of departmental position having visibility and persuasive value to courts and lawyers in a manner similar to the EEOC's subregulatory enforcement guidance.

Finding 3: DOJ has been extremely slow in issuing regulations based on the Access Board's ADA accessibility guidelines; it has delayed inordinately in issuing regulatory accessibility standards for state and local government facilities and for children's facilities.

Recommendation 3: DOJ should establish and commit itself to meet a prompt timeline for issuing regulatory standards based upon Access Board guidelines; in particular, DOJ should promptly issue the long-delayed regulatory accessibility standards for state and local government facilities and for children's facilities.

The time period for promulgating regulatory standards based on Access Board accessibility guidelines should be as short as is feasible, preferably no more than 90 days. DOJ should determine what time period is feasible in light of its internal processing requirements. The DOT model of simultaneous issuance should be examined; under ADA, DOJ has a regulatory responsibility regarding accessibility standards and is not expected to serve as a mere rubber stamp for Access Board guidelines; but as a member of the Access Board, the Department is in a position to gain familiarity with and have input on the guidelines sufficient to enable prompt if not simultaneous promulgation of regulatory standards.

2.3 Complaint Processing

Both Titles II and III require the Department of Justice to receive and process complaints of discrimination filed by individuals. However, the regulatory requirements for processing complaints under the two titles are not the same. Title II regulations require that every complaint that is received by DOJ be examined and a determination made, while this requirement is not present for Title III. Under Title III, the Department of Justice is required to examine complaints for their suggestion of pattern or practice issues and their significance for case law or policy development. As a result, the procedures for complaint processing differ. The Department of Justice also receives some complaints under Title I. However, these are restricted to complaints involving state or municipal governments that are referred from the EEOC after its processing, in situations where efforts at conciliation at the EEOC have failed. DRS enters these complaints into its database and may perform additional investigation on them before determining whether to litigate or to issue a right-to-sue letter. These complaints are only a small portion of those processed at DRS and take on a different character because they have already passed through the investigative process of the EEOC. Employment complaints that DRS receives directly from a complainant that do not involve an entity funded by DOJ are referred to the EEOC for processing, even if the respondent is a state or municipal government. When DOJ receives employment complaints regarding an entity funded by DOJ directly from charging parties, DRS sends the charging parties a letter informing them that they may either have DRS proceed with the complaint under Title II of ADA or have DRS send their cases to the EEOC for processing under Title I of ADA. Because of the disproportionately small number of cases and the relatively meager level of resources and effort that DRS devotes to Title I complaint processing in comparison to Titles II and III, the remainder of this analysis of complaint processing will focus exclusively on the Title II and III complaint processing procedures and outcome.

2.3.1 Title II Complaint Processing

Title II applies to discrimination charges in which the respondent is a state or local government entity. Title II overlaps with Section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability by any program or activity receiving federal financial assistance.[11] Section 504 of the Rehabilitation Act explicitly names state or local government activities and educational institutions and school systems as covered entities if they receive federal financial assistance, as well as private businesses or organizations that are recipients of federal assistance for their programs. Section 512 of ADA amended the

Rehabilitation Act so that the definition of disability used by the two statutes is identical. Thus, with respect to state and local governments and agencies and instrumentalities of such governments, many charges of discrimination under Title II also constitute valid charges under Section 504. ADA is broader than Section 504 in that it extends the requirements of Section 504 to all services, programs, and activities of state and local governments, not only those that receive federal financial assistance, and in some areas ADA may offer greater or more specific protections to people with disabilities. Under Section 504, unlike Title II of ADA, the termination of federal funds to the entity is a potential remedy when a violation has been shown. ADA Title II regulations explicitly make a procedural connection with Section 504 and cite statements in the legislative history of ADA noting the link with Section 504 and the intent that Section 504 enforcement procedures and mechanisms be the model for Title II enforcement.

Two significant characteristics of the Title II charge processing differentiate it from Title I and Title III processing, both of which are related to the link with Section 504. The first factor is that processing of Title II charges does not occur exclusively within the Department of Justice and the Disability Rights Section. A complainant may file a charge directly with the Department of Justice, or he or she may file it with another federal agency. The U.S. attorneys' offices sometimes receive Title II complaints directly from complainants; the U.S. attorney's office may investigate such a complaint or may forward it to DRS for processing. Charges filed with another federal agency stay at that agency if the charge falls within the agency's areas of responsibility and the agency is one of eight (including DOJ) "designated" federal agencies named in the regulations as having responsibility for Title II charge processing. Agencies so designated were those that already processed Section 504 complaints and had the largest civil rights compliance staffs and considerable experience with complaint investigations and disability issues.[12] Content area also influenced the selection of the designated agencies: each agency is assigned a complaint when the complaint deals with a state or local government activity most like the activities it otherwise deals with. The seven other designated agencies are

- Department of Agriculture
- Department of Education
- Department of Health and Human Services
- Department of Housing and Urban Development
- Department of the Interior
- Department of Labor
- Department of Transportation

When a Title II charge filed directly with the Department of Justice involves a state or local government entity related to the responsibility of one of the other designated agencies, DOJ refers the charge to that agency for handling and resolution.

The processing of Title II complaints is therefore subject to variation depending upon the agency that is performing the investigation and determination. Complaints that come into the Department of Justice (to the DRS) are logged into a database and then, if appropriate, sent out to one of the designated agencies. DRS requests some reporting back from the agency at the conclusion of its processing, but the oversight is loosely structured, and DRS does not follow up to find out what has happened to complaints that it referred some time ago. Sometimes, the agencies do report back on the disposition of charges referred to them by DRS; however, DRS does not track the cases to ensure that it receives follow-up information. Even when the other department does report back to DRS, DRS often learns only that a complaint has been closed, without obtaining any information about the nature of the resolution.

DRS estimates that its recent handling of Title II complaints generally results in a referral to the appropriate designated agency within eight weeks. However, the DOT Departmental Office of Civil Rights (DOCR) reported that some of the referrals it received from DOJ sat at DOJ for a year before being sent. An attorney from a private organization told the research team that a complaint filed with DOJ in February 1998 was not transmitted to DOT until August 1998. It was only at that point that the attorney received the first correspondence from DOJ about the complaint. A disability advocate described a complaint that has been bounced back and forth between DOJ and the Department of Housing and Urban Development (HUD) for about two years, with three to four months elapsing between each referral.

ADA Title II charges received directly by a designated agency remain with that agency for processing, and the agency does not notify DRS of receipt or outcome of such charges. As a result, DRS does not even know how many ADA Title II complaints have been filed with other agencies. In some larger agencies, the total number of Title II complaints processed internally may far exceed the number filed with DOJ and referred to the agency. The complaints received and processed at these agencies are typically considered Title II/Section 504 complaints, not solely Title II complaints. Because of the overlapping jurisdiction and statutory standards of Title II and Section 504, agencies consider any complaint received dually filed unless a particular charge raises facts that fit under only one of the statutes. The designated agencies use the same procedures for reaching a resolution of complaints under either or both of the statutes.

The Department of Justice could ask the designated agencies to report on the charges they receive directly that fall under Title II. Such data would be very useful, not only to verify that Title II complaints are being properly handled but also to provide a more accurate picture of the Title II issues raised across the nation. DRS personnel indicated that this information is not requested because of the lack of available staff time to track the receipt of such information from each of the agencies, and to read and analyze it.

A second way in which Title II charge processing differs from Title III is that under the regulations, all Title II charges must be examined and resolved. The explanation for this difference is the link with Section 504, pursuant to which DOJ must respond to every charge filed. In its first years of handling Title II discrimination charges, DRS did open and process every charge. Where possible, DRS would try to resolve the charge through a voluntary settlement. More recently, DRS has begun to send a small number of Title II charges to mediation prior to any investigation by DRS. In light of DRS's belief that mediation is less likely to be possible with larger government agencies, complaints involving small county or municipal agencies are the ones most likely to be referred for mediation.

2.3.2 Title III Complaint Processing

Complaints of discrimination that fall under Title III involve privately operated public accommodations, commercial facilities, and private entities offering certain examinations and courses. The Department of Justice is authorized to receive complaints from individuals and to investigate and resolve these complaints. However, unlike Title II, the Department of Justice does not have the obligation to investigate and resolve every complaint. For Title III, the Department of Justice is only given authority to pursue complaints and litigation selectively, focusing on pattern or practice cases and on instances of discrimination that raise an issue of general public importance. In its instructions on *How to File a Title III Complaint*, DOJ endeavors to communicate its approach by noting

> We will not necessarily make a determination on each complaint about whether or not there is an ADA violation. If we believe there is a pattern or practice of discrimination, or the complaint raises an issue of general public importance, we may attempt to negotiate a settlement of the matter or we may bring an action in U.S. District Court. Any such action would be taken on behalf of the United States. We do not act as an attorney for, or representative of, the complainant.[13]

Title III regulations explicitly encourage the use of alternative means of dispute resolution to resolve disputes that fall under Title III.[14]

The DRS processing of Title III complaints reflects these two aspects of its Title III enforcement obligations. DRS does not investigate every Title III discrimination complaint it receives, although all complaints received are read and a decision is made about what further action will be taken. Most of the complaints that DRS keeps for investigation and resolution are handled by its staff in Washington, D.C. DOJ, however, also makes a concerted effort to involve the U.S. attorneys in the enforcement of ADA. Accordingly, some Title III complaints are sent to U.S. attorneys for resolution. An increasing number of Title III complaints that may involve a violation, but which do not appear to involve pattern or practice issues or issues of general public importance, are referred for mediation. A complaint referred for mediation is not considered a complaint opened for investigation.

2.3.3 Procedures for Complaint Processing

The complaint processing methodology at DRS involves the following steps:

1. All mail received is reviewed by staff members of DRS, recorded in a database called the Correspondence Tracking System, and then distributed. DRS receives mail on a number of topics: correspondence about existing cases or complaints; questions or other correspondence about policy, regulations, or code certification; referrals of Title II complaints from other federal agencies; and new discrimination complaints from individuals. The tracking system log records the general category of the correspondence but does not classify complaints by title, primarily because the determination of the applicable title is not made until a later step. After being logged in, the mail is distributed, depending upon the issue involved, to the appropriate office or individual. Annual tabulations of the correspondence are produced as a measure of performance activity.
2. DRS expects most discrimination complaints from individuals to be transmitted by mail. E-mail complaints are not accepted. DRS will take complaints over the telephone from persons whose disability impairs their ability to send the Department a written complaint. Complaints may come in the form of a letter or on a complaint form developed by DRS. The complaint form is posted on the ADA Web site (www.usdoj.gov/crt/ada/adahom1.htm). The large majority of complaints come in the form of a letter.
3. The information provided in a letter of complaint or the complaint form is transferred onto a Complaint Report Sheet. A new complaint is reviewed by a staff person in the Investigations unit who determines whether it is a valid complaint (e.g., the issue raised is covered under ADA—it states a claim) and whether it is a Title I, II, or III complaint.
4. The Title II complaints are usually read in the investigations unit and then sent out to the appropriate designated federal agency for handling, opened for investigation within the unit, or sent to a U.S. attorney's office. Recently, some Title II cases have been sent directly to mediation.
5. Title III complaints are preliminarily sorted into one of four categories: (1) kept at DRS for investigation, (2) sent to mediation, (3) referred to a U.S. attorney, (4) sent a "do-not-open" letter. The do-not-open letter informs the complainant that due to restricted resources DRS will not be investigating the complaint, but the complainant is free to pursue private litigation. The Title III complaints, with

DRS's preliminary recommendation, are then sent to a deputy for a "second look." The deputy reviews each case to determine whether a particular case is one that DRS should pursue. Criteria for keeping a case include whether it raises pattern and practice issues and whether it involves an issue of public importance.

6. Complainants in cases that are opened for investigation at DRS (under either Title II or III) are sent a Privacy Act release. Following receipt of the signed release, an investigator begins the investigation by sending a letter or telephoning the respondent. All cases that are opened are logged into a database called the Case Management System (CMS).
7. Investigation may occur through written correspondence and telephone conversations with the complainant and respondent and, if deemed necessary, by site visits to the complainant's and respondent's location.
8. If DRS finds it likely that a violation has occurred, DRS endeavors to negotiate a settlement. Litigation of a violation that cannot be negotiated is a separate decision that is made after extensive review (see the discussion of litigation in section 4.5).
9. DRS complaint processing procedures call for sending written notifications to complainants at three specific stages. Upon receipt of the complaint, after it is logged into the CMS, DRS should send a letter of acknowledgment to the complainant. If a complaint is not going to be referred to mediation or opened, the do-not-open letter may be the only correspondence the complainant receives. Persons who had filed complaints with DOJ told the research team that such a letter was the only correspondence they received, and it was received 6-18 months after the complaint was filed. A complainant whose complaint DRS decides to investigate may get a letter asking for a privacy release as the first piece of correspondence. When a complaint is sent to mediation or to a U.S. attorney, the complainant is contacted; in most cases, this is the second point of contact with DRS. The third piece of formal correspondence some complainants receive is a copy of the letter of agreement or final disposition that is sent to the respondent. DRS indicates that it periodically updates complainants about the course of the investigation or settlement negotiations, but some advocates and complainants report otherwise. Complainants whose cases involve slow or protracted investigation or negotiation may go for more than a year without any communication from DRS.

2.3.4 Mediation

Mediation involves the parties to a dispute meeting with a neutral third person to develop a resolution that is acceptable to both parties. DOJ has employed mediation since the beginning of its ADA enforcement. Currently, DRS refers to mediation many of the Title III complaints that appear to present valid claims but which DRS does not wish to retain. A complaint referred for mediation is sent to the DRS staff person who oversees the mediation activities of DRS. This individual reviews the complaint, and if she or he concurs that it is an appropriate case for mediation, starts the process of referral. Approximately 98 percent of the complaints flagged for possible mediation at the first review are determined at the second review to be appropriate for mediation.

DRS does not conduct mediations itself, nor does DOJ employ a staff of mediators. DRS procures mediation through a contract with a private organization, the Key Bridge Foundation for Education and Research. DOJ initially awarded a grant to the Key Bridge Foundation to train mediators all over the country to perform ADA mediation. Key Bridge now not only trains mediators but also provides mediators for particular cases and oversees their work. To date, Key Bridge has trained 440 mediators and has approximately 325–350 mediators active on its roster.[15] DRS refers cases to Key Bridge, and Key Bridge refers the cases to a mediator.

A case in which mediation fails to produce an agreement is sent back to the investigations unit, where a decision is made about whether to investigate. If the failure is due to the refusal of the respondent to participate in mediation or to make appropriate changes, DRS is likely to investigate the case.

Prior to July 1999, all the mediators used by DRS worked pro bono. This situation influenced the availability of mediators and their willingness to travel. The FY 1999 budget contained $500,000 to begin paying mediators and to reimburse them for travel expenses. The budget for FY 2000 and several following years will contain $1 million for mediation. With these additional funds, DRS was able to transform the funding of ADA mediation so that all mediators are now being paid. DRS is considering removing responsibility for oversight of the mediation program from the technical assistance area and assigning it elsewhere in DRS. DRS is also contemplating the possibility of adding an additional staff member to work on mediation referrals and the record-keeping and other paperwork associated with it.

Prior to July 1999, some cases flagged and confirmed as appropriate for mediation were not referred for mediation if no mediator was available in the complainant's and respondent's geographic area (usually within a 50-mile radius, although some mediators were willing to travel farther). Key Bridge reported that the geographic coverage across the nation during this period was still fairly good, although there were some gaps.[16] If no mediator was available for a case, the case was sent back to the investigations unit. At that point, DRS usually reviewed the case again to decide whether to open an investigation or to send a do-not-open letter. DRS did not collect quantitative information regarding the distribution of outcomes at this stage. DRS reports that since it began paying mediators, there are no longer any geographical gaps, and it has not turned down any cases for mediation.

2.3.5 DRS Experience with Mediation

Since beginning mediation, DRS has referred 550 cases to mediation; 200 of these were referred in the past year.[17] Data from December 31, 1997 (with 322 cases referred at that point), indicate that 128 were successfully resolved, 20 were unsuccessful, 54 involved situations in which mediation was never initiated, and 120 were still in mediation.[18] The issues raised in the complaints sent to mediation were barrier removal (204 complaints), modification of policy (66 complaints), and effective communication (52 complaints).

Overall, approximately 15 percent of complaints referred to mediation do not, in fact, go to mediation. Reasons for this include the refusal of the respondent to participate, the closure of the respondent business, and the death of the complainant. DRS has not tracked refusals to mediate but perceives that the number of respondent refusals to participate may be increasing. Some complainants decide not to participate in mediation because they feel too vulnerable. The mediation coordinator at DRS commented that people who live in small towns seem especially concerned about the consequences for them if it becomes known that they have complained, and as a result some are reluctant to engage in mediation. She said she counsels such people that mediation may not be for them under those circumstances. The criteria used in the enforcement unit suggest, however, that such "small" cases are the ones least likely to be vigorously investigated and litigated by DRS but instead are likely to culminate in a do-not-open letter. The mediation coordinator explains the mediation program and the process to individuals who may be hesitant, as well as other options that are available to them, so they can make informed decisions whether or not to participate in mediation.

DRS reports that most mediations are completed within three to four months, although some cases may not be closed for up to a year or more, until the terms of the agreements are carried out. The central CMS database does not track any details about cases that are mediated; at the conclusion of a mediation (success or failure), the case is entered in the database. Cases resolved through mediation may be opened and closed in the CMS database on the same day. More detailed data about the mediated cases are kept in the files of the DRS staff person responsible for mediation and in the files of Key Bridge.

2.3.6 Key Bridge Mediation Responsibilities

As noted previously, the Key Bridge Foundation for Education and Research both trains mediators and supervises their activities. Key Bridge training includes training on methods of mediation and training about ADA and disability issues. ADA mediators trained by Key Bridge must have two or more years of mediation experience and accredited training recognized by a mediator association. Persons with prior civil rights mediation experience are preferred. The disability content in the mediation training is provided in part by the Disability Rights Education and Defense Fund (DREDF). This training is a one-day session; Key Bridge provides additional information to the mediators as issues arise. DRS acknowledges that one day's training is not enough, but also expresses confidence in the additional on-the-job training about disability and ADA that Key Bridge provides through its supervision of the mediators. DRS reports that if factual or technical questions arise, the mediation program brings in neutral outside experts, upon whom both parties have agreed, from the community, to assist both parties in understanding the requirements of ADA. Mediators have been provided with state resource lists that include centers for independent living, protection and advocacy centers (P&As), Disability and Business Technical Assistance Centers (DBTACs), and other organizations. Frequently, parties have located resources independently.

Key Bridge supervises the mediations being performed for DRS by calling the mediators approximately every 10 days to check on the progress of the mediation. Key Bridge also reviews all the agreements. DOJ is not a party to the mediation and does not see how the cases are resolved; therefore, responsibility for ensuring that a mediated agreement does not violate ADA and is not grossly unfair to the complainant falls to Key Bridge.

DRS staff members expressed confidence that Key Bridge was capable of monitoring the mediation process and the content of the agreements for ADA compliance. However, they did note that it would be possible for a mediation agreement to result in monetary compensation for a complainant without the respondent's being required to correct the underlying circumstance of noncompliance that led to the complaint.

As of mid-January 2000, Key Bridge reports that it has overseen the mediation of 514 ADA cases and that it has complete evaluation information on 330 of them. Of the 330 cases, 76 percent resulted in agreements. Cases in which agreements were not reached were returned to DOJ. In cases in which agreements were reached, 81 percent of complainants indicated that they were satisfied and 89 percent of respondents indicated that they were satisfied.

2.3.7 DOJ/DRS Relationship to Mediation

While DRS is anxious to refer as many complaints as possible to mediation, it is not a party to the mediation. Key Bridge, through its monitoring, is usually aware of the actions of the parties to the mediation and their respective positions, but DRS does not request or obtain any information about the fact patterns of the cases. Nor does DRS monitor the content of resolutions, although it does receive some information about the outcomes. As a consequence, DRS does not currently have information that would allow it to evaluate the quality of the settlements achieved through mediation. In contrast to the EEOC, which is signatory to the agreement as a means of securing enforcement, DRS does not participate in any formal way in the final resolution. The section chief of DRS expressed the view that if DOJ were a party to the mediation, more respondents might be suspicious of mediation and perhaps refuse to participate. He acknowledged the possibility of an imbalance between complainant and respondent but expressed confidence in the abilities of well-trained mediators to prevent this.[19]

The ADA Mediation Standards Work Group, a national body made up of practicing mediators and representatives of media service providers and professional organizations, has developed guidance for mediators and others titled "ADA Mediation Guidelines." (See Appendix C.) Approximately half of the Work Group's members have disabilities. The final Standards, released in January 2000, contain detailed provisions categorized in four broad areas of program administration, mediation process, training, and ethics. They seek to ensure high-quality mediation services in the context of ADA disputes, much as standards of practice for family and divorce mediation provide in those specialty areas.

2.3.8 Mediation from the Complainant's View

While a random sample and interviews of people who have been through DOJ-sponsored mediation of a Title II or III complaint was not possible, given the time and resource limitations of this study, researchers did interview four people who had been through the process. Three of the mediations involved a small commercial establishment; one of the mediations involved two corporate entities, one of which was quite large. Two of the four individuals reported complete satisfaction with the mediation experience, and two were mixed in their assessments. In all cases, a successful resolution of the initial complaint was achieved. The four complainants reported considerable variation in how long it took to arrange the mediation and how long mediation lasted until there was a resolution. In one case, the mediation was scheduled within a month of filing the complaint, while for two others the mediation occurred nine months after the complaint was filed. In one instance, the issue was successfully resolved in a two-hour mediation session, while for others mediation stretched out over a 1–1½ year period. The experiences of these individuals and interviews with DRS and Key Bridge personnel revealed the following important issues/questions about mediation that DRS should monitor as the use of mediation increases:

1. Are additional criteria or safeguards needed for deciding when to send a complex case to mediation? DRS told the research team it selects cases that are relatively simple. One of the cases reviewed by researchers was somewhat complex, involving two large corporate entities charged with violations by a single complainant. Both entities, from the start, had their lawyers involved. The respondent noted that the entity that was located solely in the local community seemed more interested in mediation because of concerns about bad publicity and interest in maintaining good relations in the community. The national corporation, headquartered elsewhere, displayed much less concern about those issues and less interest in reaching a settlement quickly and easily.

2. Is it possible for a complainant to participate effectively in a mediation alone? In two instances, the respondent was represented by a lawyer; only one complainant (the complex case) also had a lawyer. The complainant with the complex case felt strongly that if the respondent brings its lawyers, the complainant also needs representation. This individual said that getting a private lawyer to represent someone in a mediation is difficult, and, if the complainant cannot independently afford legal fees, the final agreement should require the respondent to pay the fees of the complainant's lawyer. Another complainant remarked that although he had not brought a lawyer with him, little progress was made toward settlement until he threatened to sue. Mediation is an unfamiliar experience for most complainants. One complainant remarked how intimidating it was, while another felt ill-prepared to negotiate an appropriate settlement and has now concluded that she settled for too little.

3. Are the mediators well enough trained? Three of the four complainants were not satisfied with the skills or knowledge level of the mediators. Knowledge about ADA and about enforcement methods was noted as especially weak. The complainants who came without a lawyer expected more guidance from the mediator than they received.

4. Should complainants involved in a mediation file a lawsuit before the start of mediation as an additional point of leverage to the mediation? Two informants suggested that the entities with which they were negotiating might have been more anxious to reach an agreement if a lawsuit had been pending in the background.

Despite the questions raised by their experiences, the four participants in mediation were willing to do it again should they file another complaint. The complainant in the case against two corporate respondents felt that without the filing of the complaint with DOJ, the respondents would not have been willing to discuss a settlement or come to mediation. The fact that a complaint had been filed with DOJ and that the agency had initiated the mediation was seen as important and helpful. This informant also believed that mediation could be an especially useful tool for resolving ADA complaints with local or relatively small entities. However, the complainant suggested that for all mediations the complainant probably needs the support of someone trained to assist complainants in the process and that DOJ should develop a mechanism for training and paying a cadre of persons to provide assistance in the mediation process.

2.3.9 Complaint Statistics

The major source of statistics about Title II and III complaints is the Case Management System database. This database does not contain all complaints DRS receives, only those received from a federal agency, those received from an individual and sent to a Title II designated agency, those opened for investigation, and those sent to mediation. Complaints resulting in a do-not-open letter do not appear in the database. As a result, the database contains more Title II than Title III complaints, even though DOJ receives more correspondence alleging violations of Title III than of Title II.

The CMS database does not indicate the date the complaint was first received, either at DOJ or at the agency it was sent to first. Thus, it is not possible to use this dataset to determine how much time elapses between the receipt of cases and their being "opened" by DOJ. The CMS database is the primary source of information about DRS case processing of opened cases. However, because of limitations on the data collected and the time frames in which it is entered, the database does not provide a means for tracking the resolution process of a complaint. For example, it does not record detailed process information about mediation cases (e.g., when referred, whether referral was accepted, why or why not), and it is often missing closing information for Title II complaints processed by a referral agency. An examination of the database also revealed a great many cases for which data are missing.[20] The tables on the pages that follow describe the complaints in the CMS database between FY

1992 and FY 1997, subject to the caveats described in this section about the quality of the data upon which these tables are based.

Table 2-1

Frequency Distribution of Complaints by Statute Received FY92-FY97 and Referred out to a Title II Agency, Opened for Investigation at DOJ, or Sent by DOJ to Mediation

Statute	Number of Complaints	Percentage
ADA, Title I	319	3.2
ADA, Title II	6,793	67.5
ADA, Title III	2,953	29.3
Total	10,065	100

2.3.9.1 Characteristics of Title II and Title III Complaints

Table 2-1 displays the distribution of complaints in the Case Management System. From this distribution it is clear that the majority of complaints (nearly 68%) opened by DOJ fall under Title II. This is the result of the regulatory requirement that every Title II complaint be handled, while Title III complaints may be selectively opened and investigated.

Table 2-2 displays a breakdown of the types of issues raised in Title II complaints. For the Title I complaints, the database included no information about the nature of the complaints. For Title II, there is information on "Issue1" for about 5,000 cases and on "Issue2" for about 5,000 cases.[21] The categories used are derived from the codes contained in the DRS database. They are a mix of some locations (prisons, courthouses), type of service (auxiliary aids), and impairment (HIV/AIDS). Some cases raised more than a single issue. 10,824 issues are reported for the 6,793 Title II complaints.

The distribution in Table 2-2 shows that 22.6 percent of all the issues raised in the Title II complaints involve service delivery and 20.1 percent involve government offices. Smaller, but still significant, percentages involve inaccessibility, corrections settings, auxiliary aids, public buildings, and aspects of court procedure or courthouse access. A cleaner categorization of circumstance would provide a clearer picture of these Title II issues, as duplication across the categories appears considerable.

Table 2-3 and Table 2-4 display the distribution of settings and issues for the Title III complaints in the CMS database. The types of establishments subject to the most complaints are service establishments, places of lodging, sales or rental establishments, establishments that serve food, and places of exhibition or entertainment. A much smaller proportion of the complaints involve transportation, social service centers, and places of public gathering. Table 2-4 shows that the key issues raised about these entities involve access to existing facilities, allegedly discriminatory policies, and the use of auxiliary aids. A smaller proportion involve new construction or alterations and transportation. The Title III complaint distributions are derived from cases opened by DRS for investigation or cases sent to mediation; they do not include complaints that DRS did not open or refer to mediation and thus may not correspond to the distribution of establishments or issues in the total complaint correspondence received by DRS.

Table 2-2

Complaint Issues of Title II Complaints

Issue (Title II Cases)	Frequency	Percentage
Service delivery	2,444	22.6
Government offices	2,175	20.1
Inaccessibility	1,283	11.9
Corrections (institutional and community-based) and parole/probation	1,046	9.7
Auxiliary aids	1,025	9.5
Public buildings	812	7.5
Courts and courthouses and jury service	467	4.3
Law enforcement and police	423	3.9
Employment	363	3.4
Environmental illness	162	1.5
Self evaluation/transition plans	146	1.4
Testing	97	0.9
Laws and policies	94	0.9

Issue (Title II Cases)	**Frequency**	**Percentage**
HIV/AIDS	74	0.7
Fire and rescue	68	0.6
Retaliation	55	0.5
New construction	36	0.3
Voting	35	0.3
Zoning	14	0.1
Insurance	4	0.04
Commerce	1	0.01
Total issues raised	10,824	100

Note: Complainants may raise multiple issues.

Table 2-3

Types of Public Accommodation in Title III Complaints

Type of Public Accommodation	**Frequency**	**Percentage**
Service establishments	583	21.9
Places of lodging	451	17.0
Sales or rental establishments	411	15.5
Establishments serving food	364	13.7
Places of exhibition or entertainment	287	10.8
Places of education	175	6.6
Places of recreation or exercise	164	6.2
Transportation, including public stations	70	2.6
Social service center establishments	68	2.5
Testing	43	1.6
Places of public gathering	19	0.7
Commercial facilities	15	0.6
Places of public display or collection	7	0.3
Total	2,657	100

Note: Missing data=296.

Table 2-4

Types of Title *III* Complaint Issues

Type of Issue for Public Accommodation	Frequency	Percentage
Policies	752	28.2
Auxiliary aids	355	13.3
Existing facilities	1,303	48.9
New construction	96	3.6
Alterations	78	2.9
Transportation	41	1.5
Retaliation	22	0.8
Testing	18	0.7
Total	2,665	100

Note: Missing data=288.

2.3.9.2 Duration and Disposition of Complaints

Table 2-5 displays the duration from opening to closing of the Title II and III complaints in the CMS database. Altogether, the database includes closing dates for 2,827 (42%) of the 6,793 Title II complaints and for 1,670 (57%) of the 2,953 of the Title III complaints. The principal reason for the absence of a closing date is that the complaint has not yet closed; in some cases, however, data are missing, either for the date of opening or closing. The duration table shows that a slightly larger proportion of the Title II complaints close in a shorter period of time. Approximately 42 percent of Title II complaints compared to 38 percent of Title III complaints are closed within 12 months; 83 percent of Title II complaints compared to 77 percent of Title III complaints are closed at the end of three years. However, in comparison to Title III complaints, more Title II complaints are open for more than five years (47 vs. 11).

Table 2-6 displays the distribution of complaint dispositions. Disposition information is present in the database for fewer than one-half of the cases. The data in Table 2-6 are for Titles I, II, and III. The categories are mutually exclusive; however, the table is derived from the combination of two different variables in the dataset. The category "Responses to referrals to non-DOJ agencies" indicates that information was received about a complaint referred to a designated agency, but does not identify the type of resolution.

Table 2-5

Distribution of Duration from Opening to Closing Title II and III Complaints in CMS Database

Case Duration	Frequency for Title II	Cumulative % for Title II	Frequency for Title III	Cumulative % for Title III
0 to 3 months	226	7.99	124	7.43
3 to 6 months	426	23.06	162	17.13
6 months to 1 year	526	41.67	352	38.20
1 to 1.5 years	393	55.57	239	52.51
1.5 to 2 years	313	66.64	165	62.40
2 to 3 years	471	83.30	253	77.54
3 to 4 years	286	93.42	199	89.46
More than 4 years	186	100.00	176	100.00

Table 2-6

Disposition of Title I, II, and III Complaints in the CMS Database

Disposition	Title I %	Title II %	Title III %
Responses to referrals to non-DOJ agencies	72.8	54.7	7.6
Responses to referrals to DOJ agencies	4.5	1.9	3.7
Administrative closure (failure to locate complainant, etc.)	3.6	3.3	23.8
Not timely (issue resolved, not a complaint)	.9	9.7	33.3
Letter of findings (violation or compliance)	.9	9.9	5.3
Settlement/voluntary compliance agreements		8.5	20.5
Enforcement action		1.6	.2
Investigation suspended/deferred (other agency investigating)		.0	4.8
Dismissed	.9		

Disposition	Title I %	Title II %	Title III %
Investigation closed	.9	7.8	.4
Miscellaneous	1.8	.5	
Other resolution	1.8	1.4	
Right-to-sue letter	11.7		
Settlement.	0	.3	.3
Disposition in favor of the U.S.			.1
Withdrawn		.4	
Total	100.0 (n=111)	100.0 (n=2,657)	100.0 (n=1,618)

Note: Blank cells indicate no observations were made for the disposition shown under ADA title indicated. Disposition data were available for fewer than half of all opened complaints.

2.3.9.3 Designated Agency Referral under Title II

As noted in section 2.3.1, Title II regulations specify that complaints received by DOJ that are related to the area of jurisdiction of one of seven cabinet agencies should be referred to that agency. The Department of Justice retains complaints involving other issues. Table 2-7 shows the distribution of agency responsibility for the complaints received by DOJ. Nearly 50 percent of the complaints are retained for processing by DOJ. The largest proportion of referrals are to the Departments of Education, Transportation, and Health and Human Services.

Table 2-7

Distribution of Title II Referral and Processing for Complaints Received at the Department of Justice

Investigating Agency	**Frequency**	**Percentage**
Department of Justice (DOJ)	3,229	48.8
Department of Education (DOE)	1,255	19.0
Department of Transportation (DOT)	832	12.6
Department of Health and Human Services (HHS)	635	9.6
Department of the Interior (DOI)	271	4.1
Department of Housing and Urban Development (HUD)	167	2.5
Department of Labor (DOL)	141	2.1
EEOC	84	1.3
Total	6,614	100
There were 24 referrals to a nondesignated agency listed with this variable		

Source: U.S. Department of Justice, DRS, Cordmain dataset, author calculation.

The offices for civil rights of the designated agencies generally handle the processing of Title II complaints. These offices have been responsible for handling Section 504 complaints under the Rehabilitation Act. The response of the designated agencies to the receipt of Title II complaints has been to add these complaints to their complaint databases and to investigate and resolve them as they do Section 504 complaints. Most of these agencies classify the complaints as "Title II/Section 504" complaints. Discussions with the Departments of Education and Health and Human Services indicated that they consider few complaints to be only Section 504 or only Title II complaints. This is not surprising, as amendments to the Rehabilitation Act following the passage of ADA narrowed the differences between the legal standards applicable under the two acts.

The Title II designated agencies not only receive referrals from DOJ, they also receive Title II complaints directly (which they generally do not distinguish from Section 504 complaints). At the larger agencies—the Departments of Education, Health and Human Services, and Transportation—the number of Title II/Section 504 complaints they directly receive and process may exceed the number they receive by referral from DOJ. When researchers contacted the designated agencies, their reports indicated that the agencies vary in the degree to which they track and can account for the Title II/Section 504 and the Title II-only complaints they receive. For example, the Department of Education keeps a large database that it made available for this research. Analysis of the database indicates that the Department received approximately 7,861 complaints between 1993 and mid-1998 that were classified as Title II/Section 504 or Title II only. All but a small proportion were considered dually covered by both statutes. The Department of Health and Human Services made available a summary of data for fiscal 1997 and fiscal 1998 that lists the Title II/Section 504 "workload" for those years at 278 complaints.[22] The format of the chart makes it difficult to estimate the total number of Title II complaints in process. In an earlier report to the National Council on Disability, however, the Department of Health and Human Services reported it had received 483 Title II/Section 504 complaints from the effective date of ADA through 1994.[23] The Department of Interior reported that in FY 1997, it received 142 Title II/Section 504 complaints, with 40 percent of them coming from DOJ and the remainder coming in directly from complainants. The Department of Agriculture reported that it does not merge the Title II complaints it receives from DOJ with the complaints it receives directly (and considers Section 504 complaints). The Department reported receiving approximately 3 ADA complaints per year. The Department of Housing and Urban Development reported that it received a total of 228 ADA/Section 504 complaints in FY 1999, of which 3 were ADA Title II only; HUD does not keep track of which complaints it receives by referral from DOJ and which it receives from complainants directly. The Department of Labor indicated that it received 15 Section 504/Title II complaints and 5 Title II only complaints in 1997; 16 Section 504/Title II complaints and 2 Title II only complaints in 1998; and 19 Section 504/Title II complaints and 11 Title II only complaints in 1999. Finally, in the Department of Transportation, ADA/Section 504 enforcement is distributed across the operating administrations. The National Highway Transportation Safety Administration estimated it had received 102 ADA/Section 504 complaints from the beginning of ADA through January 1998. The Federal Transit Administration reports receiving approximately 887 complaints from 1991 through 1998; and a log from the Federal Railroad Administration indicates that

64–75 ADA complaints were received between 1993 and June 1998. A Federal Highway Administration log shows 215 ADA complaints, most of them between 1994 and April 1998 (some of the date fields are missing). The Coast Guard reported it had received 5 ADA complaints.

The total number of ADA Title II complaints filed nationwide since ADA took effect cannot be calculated and is extremely difficult even to estimate. Clearly, it is larger than the approximately 6,600 complaints in the DOJ database. Because of the manner in which the referral agencies categorize the complaints in their own databases, it is also difficult to produce an unduplicated count that separates the complaints referred to the agency by DOJ from the complaints received directly.

Interviews with the Office for Civil Rights staff in the Departments of Education and Health and Human Services indicated that both offices focus their Title II/Section 504 enforcement efforts on negotiating resolutions rather than on determinations of violations. Both offices consider litigation a last resort and are selective about the cases identified for litigation. It appears that most of the designated agencies choose to take administrative enforcement action on their dually covered (ADA/Section 504) complaints themselves rather than referring them to the Department of Justice for litigation.

2.3.10 Issues Regarding Complaint Processing

Members of the disability community have expressed considerable disappointment about ADA complaint processing of the Department of Justice. Problems identified include

- the length of time that elapses between mailing in a complaint and getting a response
- the large number of individual complaints that apparently get no response from DRS
- the difficulty of knowing what is happening to a complaint that has been filed
- the use of mediation instead of investigation

- the focus on settlement instead of litigation
- the selection of complaint issues that receive investigation and/or are litigated

Information obtained by the researchers confirms many of these criticisms. Communication and correspondence with complainants is not frequent. DRS staff members believe that there is now a more consistent effort to acknowledge complaints and that the time that elapses between receipt and acknowledgment has been reduced so that it is now in the range of eight weeks.

A key area of contention is the perception that the Department of Justice will do nothing with most Title III complaints and that it should be handling and resolving them. DOJ understands its mandate under Title III is to focus on big issues and pattern or practice cases, not on the resolution of individual complaints involving the corner grocery or dry cleaner. Many people with disabilities have the expectation that, like the EEOC, the Department of Justice should work to remedy every legitimate complaint of discrimination in public accommodations. In large part, this dispute is fueled by a lack of awareness on the part of some members of the disability community of the differences in the enforcement provisions of Titles I and III of ADA, ascribing a much more limited role to the Department of Justice under Title III than the EEOC is assigned under Title I. In fact, Title III gives the Department of Justice authority to commence a civil action in court only in two particular circumstances: (i) where a person or group engages in "a pattern or practice of discrimination," or (ii) where a case "raises an issue of general public importance."[24] This jurisdiction is much more limited than the EEOC's authority under Title I. In addition, however, ADA directs DOJ to "investigate alleged violations" of Title III and to "undertake periodic reviews of compliance of covered entities."[25]

The result is that DOJ has limited authority to pursue remedies in court, coupled with a broad authority to investigate and conduct compliance reviews. Given a choice between using its resources to investigate "big-issue" cases that it can take to court and to investigate cases it deems to be of less public importance (although they may be of critical importance to particular individuals with disabilities) that it cannot pursue in court even if it finds a violation, DOJ has a tendency very often to choose the former.

Related to the issue of the selection of complaints for investigation is a criticism that DOJ, when it chooses to investigate, does not select cases well. DRS staff members told researchers that they have tried to achieve maximum impact by focusing on entities that are part of corporate chains, such as Days Inn, or that may affect large numbers of persons, such as stadiums. Critics of this strategy charge that it does not put sufficient focus on those entities that most people encounter in daily living, such as the local grocery store, the doctor's office, and the bank.

Mediation as a means of Title III enforcement is another area of contention. Alternative dispute resolution (ADR) is clearly being encouraged by the Federal Government, through executive order, statutory language, and congressional appropriation. ADA expressly endorses the use of "alternative means of dispute resolution, including ... mediation."[26] DOJ's emphasis on mediation is consistent with an overall trend throughout the Federal Government. A concern, however, is that the parties do not come to mediation with equal power, a complainant with a disability may be considerably less informed and influential than a business entity. In some circumstances, people with disabilities may feel pressured into accepting a mediated solution that solves their individual problems but does not address systemic problems and sets no broader precedent for the prevention of future violations. This is a generic criticism of the mediation approach, and one which DRS acknowledges, while it nonetheless continues to expand its mediation efforts. The overall and ongoing challenge is to achieve a proper balance between strategies that provide efficient and nonlitigious solutions to individual problems and those that use the individual problem as a means for achieving more widespread change.

2.3.11 Findings and Recommendations

Finding 4: Titles II and III of ADA assign DOJ authority for receiving and investigating complaints, but DOJ's responsibilities for enforcing Title III of ADA differ somewhat from the complaint-processing role of the EEOC under Title I. While

DOJ ADA complaint-processing procedures continue to evolve and appear to be improving, there are still problems.

- DOJ refers or resolves nearly every Title II complaint but does not open for investigation most Title III complaints.
- Title III complaints are too often sent to mediation or returned to the complainant with a do-not-open letter indicating that DOJ will not investigate.
- While procedures used by DOJ for enforcing Title III are consistent with requirements of ADA, many people have the impression that filing with DOJ is similar to filing with the EEOC; that is, that all complaints will be investigated and "something" done with them. In fact, DOJ does not conduct its Title III enforcement in this manner, but is much more selective in the cases that it handles. The view that DOJ "does nothing" is a result of the mismatch of expectations and procedure.
- DOJ does not communicate quickly or regularly with complainants on the status of their complaints. Some complainants received no acknowledgment or other communication from DOJ for over a year following the submission of complaints until DOJ informed them that their complaints would not be investigated.
- DOJ can be slow in referring complaints under Title II to the appropriate designated agency.
- The length of time that elapses in the complaint-handling process puts complainants at risk of losing their private right to sue because the statute of limitations may run out.

Recommendation 4: DOJ should continue to improve its complaint-processing procedures and performance.

Critical goals include speedier processing of complaints, better and more frequent communication with complainants, providing complainants with better information about the nature of the complaint processing process and DOJ responsibilities for the particular type of complaint at issue, and conforming with time frames of statutes of limitations for complainants to pursue private suits.

Recommendation 5: DOJ should make strong efforts to communicate to people with disabilities and the general public that it does not have the legal responsibility to and

will not investigate every Title III complaint but rather will use complaints to identify pattern or practice issues or issues of general public importance.

Every Title III complainant should receive a letter within six weeks of filing, acknowledging receipt of the complaint, explaining DOJ's complaint-handling process, and clarifying that DOJ does not investigate every Title III complaint it receives.

Recommendation 6: DOJ should develop mechanisms that would significantly increase opportunities for the disability community to provide input regarding priority areas under Title II and Title III of ADA, including complaint-processing, compliance monitoring and technical assistance activities, and enforcement actions.

DOJ reports that the Civil Rights Division, including the Disability Rights Section, has "frequent interaction" with the disability community through conference participation and other forms of outreach, and that it plans to continue to seek input from individuals with disabilities and their representatives from such interaction. The National Council on Disability believes that this interaction is not sufficient to gain appropriate input from the disability community. Many individuals with disabilities and their families do not have the opportunity to attend conferences.

Holding public forums or "town meetings" would provide opportunities for more widespread input. In 1995, the Disability Rights Section held three "Grassroots Partnership Meetings" in different parts of the country (Pittsburgh; Pennsylvania; Houston; Texas; and Sioux Falls, South Dakota) to examine its ADA technical assistance efforts. DRS should hold similar meetings periodically, to obtain input on all ADA issues (policy development, investigation, compliance review and litigation priorities, and technical assistance). Summaries of the input received at these meetings should be provided to the public in the Department's quarterly *Status Reports*. DRS has also participated in nationwide "conference calls" with centers for independent living to provide updates on ADA and hear concerns regarding local ADA issues. DRS should conduct similar outreach to other constituencies within the disability community.

Finding 5: DOJ is sending increasing numbers of Title II and III complaints to mediation and has received additional funding to increase and modify mediation activities.

- Prior to July 1999, DOJ pursued mediation through a grant to an external provider and pro bono mediators. With new funds for mediation, DOJ has entered into a service contract with the outside organization and now pays mediators.
- DRS reports great satisfaction with how mediation is working and the outcomes it is achieving for complainants.
- To the extent that the contractor identifies problems or shortcomings in the current mediation process, the current contract calls for the contractor to propose solutions.
- Most mediations have involved Title III complaints. Of those referred, the parties engage in mediation in approximately 80 percent of the cases referred; in 63 percent of cases referred for mediation in which the parties agree to mediate, the cases are settled.
- DOJ does not involve itself in the mediation process as a party, through oversight of the legality of the outcome, or as a signatory to the agreement for enforcement purposes.
- Some contend that a problem with mediation is that it too frequently produces relief for the complainant without correcting the underlying illegal practices of the respondent.

Recommendation 7: As it expands its mediation program, DOJ should provide greater oversight of the mediation activities and of the settlements achieved through mediation, including the following:

- DOJ should fund by contract a systematic study of how its ADA mediation is working, including an assessment of the extent to which the rights of persons with disabilities are being protected in the mediation process, of whether mediators are sufficiently skilled and trained, and of whether mediation agreements achieve results that are satisfactory to the parties, comply with the legal requirements of ADA, and are implemented. The study should include interviews with mediators to ascertain if they need additional training and should include a review of results of mediations completed to date, of mediation agreements that have resulted, and of implementation of terms agreed to.

- DOJ should adopt standards along the lines of the "ADA Mediation Guidelines" to govern mediations of ADA disputes.
- DOJ should provide or fund additional ADA training of mediators.
- DOJ should develop and fund a cadre of trained and paid mediation advocates to support complainants through mediation.

With regard to the recommendation that DOJ should develop and fund a cadre of trained and paid mediation advocates to provide support to complainants, DOJ indicated, in an official response to a review draft of this report, that it strongly disagrees with this recommendation. In the Department's view, the role of the trained mediator is, in part, to ensure that the complainant is not overwhelmed by the opposing party. Furthermore, the need for such assistance was met to a large extent by the inclusion in the Department's early training program of a component on mediation to educate disability rights advocates about the mediation process; one of the goals of this component was to help advocates assist in mediation.

A systematic study, as proposed in the recommendation, of how mediation is working should provide evidence of whether complainants are or are not sufficiently disadvantaged in the mediation process to justify a mediation advocates program of the type that the National Council on Disabilities calls for in the recommendation. In the absence of such information, DOJ's contentions that the mediators are successfully addressing this problem are not convincing.

Finding 6: Data collection and analysis in DRS is not organized well and has various deficiencies, including the following:

- Considerable data are missing from the complaint database; the complaint database does not track details of case processing (including cases sent to mediation); and data are not entered on a timely basis.
- Only opened cases are entered in the database, so DRS does not know the total number of complaints received, even if not all are opened.

- The existing database is not useful for analysis of past performance, nor for DRS planning purposes, such as anticipating the flow of complaints, issues, etc.
- No publicly available database of Title II and III complaint-handling and litigation exists.

Recommendation 8: DOJ should dramatically improve its collection, data-entry, and data-analysis processes with regard to the complaint database; improvements should include the entry of complete data; expanding the database to track the disposition and outcome of all complaints, not just those opened by DOJ; periodically analyzing the data to identify trends and problems with complaint handling; and making appropriate data on Title II and III complaint handling and outcomes available to the public in an accessible and usable format.

The database should include the date complaints are first received, both at DOJ and, in the case of complaints initially filed with another department and then referred to DOJ, at the other department. The data should make it possible to determine how much time elapses between the receipt of cases and their being opened by DOJ. The database should include information about cases sent to mediation, including the date a case was referred, whether referral was accepted, the reasons why cases were not accepted for mediation, the nature of the complaint, and the outcome of mediation. It should also track the timing, processing, and outcomes of Title II complaints referred to other agencies.

Finding 7: Under Title II, much of the complaint handling is to be performed by the appropriate cabinet agency from among the seven specifically designated in ADA regulations. While these agencies are to process the complaints, violations or pattern or practice issues are to be referred to DOJ for litigation. The referral process is not monitored well by DOJ and has resulted in few Title II cases in which the Federal Government is the plaintiff.

- DOJ is slow to refer complaints to the designated referral agencies.
- When DOJ sends complaints it receives to a designated agency, it often receives back a report on the disposition. However, DOJ does not always follow up on referred complaints. Moreover, it does not track the Title II complaints that are received directly by the agencies.
- DOJ referral agencies seldom refer cases to DOJ for litigation; the Department of Education has referred one case, Health and Human Services has referred one or two cases, and HUD and DOT have referred no Title II cases to DOJ for litigation.

The failure to track what is happening at the referral agencies means that DOJ is not monitoring the majority of Title II complaints. This restricts the ability of DOJ to identify crucial Title II enforcement issues that need resolution through litigation, public agency or general community education, or though the development of a policy guidance. By institutionalizing its oversight and monitoring of Title II complaints, DOJ could more readily identify significant cases.

Recommendation 9: DOJ should improve its handling of referrals of Title II complaints to the designated agencies in the following ways:

- DOJ should refer complaints to the designated agencies more promptly.
- DOJ should increase its tracking and oversight of Title II complaints, both those it receives directly and refers, and those complaints that are filed directly at a designated agency.

DOJ should implement increased oversight by regulation, memorandum of understanding, or policy directives. It should require review on an annual basis of the complaints at each of the referral agencies. Such a report should indicate the complaints received and their resolution. In an official response to a review draft of this report, DOJ indicated its agreement with the need for speeding up its referrals of complaints to other agencies and stated that it is continually revising its systems to achieve increased efficiency. It also agreed that it needs to improve its tracking of referred Title II complaints but indicated that it prefers to do so through the existing mechanism of the annual civil rights implementation plans provided to the Department pursuant to Executive Order 12250. The Department believes that the Executive Order and the Title II regulation provide sufficient authority to the Department, and that expending resources to develop more processes, such as memoranda of understanding, would not be productive nor likely to improve the ultimate product. NCD is of the view that concerted, forceful action is necessary to address this problem and that DOJ should consider various means, including memoranda of understanding, to resolve it.

2.4 Compliance Monitoring

The Department of Justice's ability to enforce ADA is not restricted to waiting for individuals with disabilities to file complaints of violations. Compliance monitoring refers to proactive measures to assess and ensure conformance with the requirements of a law in advance of the report of a violation. Title III of ADA specifically assigns the Department of Justice the authority and duty to "undertake periodic reviews of compliance of covered entities."[27] Title II states that it is subject to the same remedies, procedures, and rights set forth in Section 505 of the Rehabilitation Act of 1973. (42 U.S.C. § 12132.) Section 505 of the Rehabilitation Act is subject to the same remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964. (42 U.S.C. § 794a(a)(2).) Under the Department of Justice's regulations implementing Title VI, the Department shall conduct periodic compliance reviews of recipients to determine whether they are complying with Title VI. (28 C.F.R. § 42.107(a).) Thus, through this chain of references, the Department has authority to conduct compliance reviews under Title II. Title I does not mention DOJ compliance monitoring directly or indirectly. DOJ regulations implementing ADA do not elaborate on its compliance review authority.

2.4.1 Code Certification

A highly significant authority and responsibility of DRS involves its certification of state and local building codes. Certification is intended to indicate that a locality's building code is in conformance with ADA Accessibility Guidelines (ADAAG), developed by the Architectural and Transportation Barriers Compliance Board (Access Board), and included in ADA regulations. Participation in the certification process is voluntary, although the facilities of states and municipalities are subject to ADA accessibility requirements. Currently, most states have an accessibility code, but none of the national model codes has yet been determined to be ADA-equivalent and some of the states have adopted all or part of ADAAG but have not adopted all of the statutory requirements (contained in the DOJ rule) that are necessary to make a code truly equivalent to ADA requirements.

The Certification and Coordination Unit of DRS is responsible for performing the assessment required to certify the building codes. Staff in this unit include a supervisor, three attorneys, an accessibility code specialist, and an architect. Some efforts have been made through speeches and written materials targeted to the design community to encourage states to submit their codes for certification. A letter explaining to governors the advantages of having the state building code certified is another example of DOJ's efforts at outreach. In addition, the unit offers extensive technical assistance to states as part of its analysis of their codes. It also provides technical assistance to other private sector organizations in response to requests. Before issuing the final certification determination, DRS provides public notice of the proposed certification determination and conducts a public hearing and solicits public comments.

States have been slow to submit their building codes for certification. So far, four states have had their codes certified and several other states are pending. Following the recent letter sent by the assistant attorney general to state governors, one additional state has submitted its code, and about six additional state inquiries have been made.[28] DRS was slow (years) in completing the first certification review, because it was not fully prepared to assess the differences between ADA and building code requirements in general. The recent certifications have gone more quickly, even though not all states approach building codes in the same manner.

2.4.2 9-1-1 Accessibility Compliance

The Civil Rights Division, working with the U.S. attorneys' offices, initiated a nationwide review of the accessibility of 9-1-1 emergency services in September 1996. As part of this project, technical assistance materials about 9-1-1 accessibility for persons who are deaf or hard of hearing or who have speech impairments were developed and distributed. These materials are also available on ADA home page. Staff from all 94 U.S. attorneys' offices were trained about ADA and the 9-1-1 access issues and compliance requirements, and given the task of assessing 9-1-1 compliance with their areas. The U.S. attorneys' offices have been entering written agreements with 9-1-1 service centers that require each 9-1-1 center to have TDD capability at each call-taker position, to query every "silent call" with a TDD, and to train each call taker thoroughly in proper techniques for handling TDD calls. The Department has conducted more than 500 compliance reviews of 9-1-1 centers.

2.4.3 Other Compliance Activities

Apart from its assessments of 9-1-1 accessibility compliance, DOJ has made fairly little use of its authority to conduct compliance reviews. DRS does not issue any list or report summarizing the compliance reviews it does conduct. The Department has initiated some reviews of compliance with regard to newly constructed facilities or alterations of existing facilities subject to the accessibility requirements of Title III of ADA. As a result of such efforts, it entered into settlement agreements with Lone Star Steakhouse and Saloon, Inc., restaurant chain[29] and the Angelo Community Hospital of St. Angelo, Texas,[30] pursuant to which the covered entities agreed to comply with accessibility requirements. DOJ continues to use compliance reviews of about-to-be-constructed facilities when it learns from construction plans that a building is about to be constructed that will not comply with ADA standards. At times, as with regard to DOJ's suit against Days Inn of America, compliance reviews can prompt DOJ to file suit against covered entities that are found to be significantly out of compliance.

DRS disagrees that it has made fairly little use of its authority to conduct compliance reviews. It notes that it initially approached its ADA enforcement responsibilities by focusing on complaints it had received. Over time, it found that complaints were providing it with a wide array of ADA enforcement issues, giving it the opportunity to address most of the serious areas of noncompliance. As a result, DRS has used compliance reviews mainly to address a small number of issue areas in which it was not receiving sufficient complaints. A prime example is DRS's use of compliance reviews with regard to accessibility of alterations and new construction. DRS found that it was not getting many complaints regarding inaccessibility of new construction or alteration projects, because most people were unaware of it until after the facilities were constructed or the renovations completed; accordingly, DRS began to conduct compliance reviews of planned construction and alterations to ensure accessibility. DRS intends to continue to use compliance reviews to supplement its complaint-generated enforcement activities. For example, DOJ is finding that it receives very few ADA complaints from people with mental retardation and is developing methods to target discriminatory practices affecting such persons.

2.4.4 Findings and Recommendations

Finding 8: DOJ got a slow start in certifying state and local building codes; now that it has developed a methodology and gained familiarity with the task, however, it is certifying codes more quickly.

- DOJ is engaging in outreach to states and municipalities to encourage them to submit their codes for certification.

Finding 9: DOJ has made limited use of its statutory authority to perform compliance reviews of covered entities under Title III, nor has it made much use of its authority to conduct compliance reviews of entities covered by Title II.

Recommendation 10: DOJ should increase its compliance review activities and make creative use of accessibility surveys, testers, and other proactive techniques for identifying and remedying violations of ADA by covered entities. With the input of the disability community, DRS should identify priority areas for performing such reviews, taking into account the frequency, extent, and harmfulness of particular types of noncompliance, along with the degree to which particular types of noncompliance are less likely to be effectively addressed and remedied through individual complaints.

The Department of Justice indicated that it agrees with the substance of this recommendation but observed that if it follows the recommendation, DRS would have even fewer resources available to handle actual complaints and litigation.

2.5 Litigation

The Department of Justice is authorized, at its discretion, to file civil actions and seek monetary damages and civil penalties to achieve compliance through litigation. Despite having authority to litigate, the Department is neither required nor inclined to take every case to court and litigate it to a judicial decision. In accordance with the enforcement philosophy of the attorney general—"educate, negotiate, litigate"—most of the cases worked on by DOJ are settled before they become a formal court suit.

A majority of actions that are filed by DOJ are eventually settled through consent decrees. A consent decree is a "judgment entered by consent of the parties whereby the defendant agrees to stop alleged illegal activity without admitting guilt or wrongdoing."[31] Once such an agreement has been approved by the court, DOJ discontinues its pursuit of the legal action against the defendant. These decrees are monitored and enforced by the federal court in which they are entered. Such a decree binds only the consenting parties and sets no binding precedent for other courts or parties to use as guidance in future litigation.

As an alternative to filing suits against particular defendants itself, DOJ may intervene as a party in an ongoing ADA suit brought by some other plaintiff with the leave of the court. DOJ may also enter as an amicus or friend of the court. As an amicus, DOJ submits briefs to assist the court in its deliberations, often designated as in support of one of the parties, in which it takes a position or proffers a rationale representing its views. Usually, DOJ enters a case as an intervenor or amicus only when it has a strong interest in the subject matter of the action or precedent that may be set or when the case concerns an issue of broad public interest.[32]

The majority of complaints that the Civil Rights Division pursues are settled by defendants' agreeing to voluntary compliance. This is partly because President Clinton's Executive Order 12988 requires all federal agencies involved in civil litigation to attempt to seek voluntary compliance through negotiations and settlements before any litigation is attempted.[33] Voluntary compliance occurs when the covered entity voluntarily agrees to make specified modifications, sometimes after extensive negotiations with DOJ attorneys.[34] The results are informal and formal settlement agreements that can resolve contentious ADA discrimination issues before DOJ files a complaint in court.

2.5.1 Litigation Priorities

ADA litigation priorities are set at several levels within DOJ. The overall strategic plan of the Department of Justice is one source of influence. The interests of the attorney general also play a role. Several staff members of DRS and others in the Civil Rights

Division mentioned that the current attorney general is especially interested in ADA enforcement. Closer to the actual specific litigation decision-making process is the assistant attorney general for civil rights. The Civil Rights Division determines its priorities through its strategic planning process and through meetings the assistant attorney general convenes within the Civil Rights Division and with groups outside. The parameters of the priorities are set at the division level, but DRS staff members are consulted in the process. Both DRS, where cases are initially identified, and the "front office" (the office of the assistant attorney general), which must concur in litigation decisions, participate in interpreting the extent to which particular types of litigation conform to the priorities.

DRS identified the following as its current ADA enforcement priorities:

- New construction (including liability of architects)
- Focus on chains (e.g., chain stores, hotel chains)
- Insurance
- Transportation
- Hospitals and interpreters
- Employment
- Constitutionality (of Title II)
- Coverage issues (e.g., whether Title II covers employment)
- Most integrated setting in the provision of health care (this issue is discussed in section 2.10)

In interviews, a counsel to the assistant attorney general, and the DRS section chief, deputies, and the special legal counsel mentioned some additional issues that are not a formal part of the litigation priorities but which these individuals considered a significant DRS interest. These include[35]

- Cases involving mental health or mental retardation issues (including those involving insurance)

- Stadium-style seating in movie theaters
- Franchiser liability under Title III (not just franchisees)
- Coverage of ADA (e.g., prisons, state animal quarantine policies)
- Title II services that are fundamental to participation in civic life

2.5.2 Factors that Influence Litigation Decisions

While the formal priorities set the topics of focus, some additional factors influence which cases DRS actually pursues. These factors include the litigation opportunities (i.e., the cases that are presented to DOJ); a case's potential to develop positive case law; whether or not the case is seen as a "good case," which DOJ is likely to win; and, for cases of possible intervention in private litigation, the quality of the case and the capability of the private counsel. DOJ is also interested in maintaining diversity (i.e., cases presenting different issues and different types of defendants and complainants) in the docket and in cases that will work to develop the law in a positive direction.

With regard to Title II, DRS must rely on cases referred to it for litigation from the designated agencies, unless a complaint falls within the set of Title II issues to be handled at DOJ. The designated agencies, especially those with their own sizeable civil rights offices, appear to prefer to keep and resolve cases themselves. They can do so because of their Section 504 jurisdiction. So far, only one referral has come from the Department of Education, and a few have come from the Department of Health and Human Services. HUD has not referred any ADA cases, although it has referred cases to the Housing Section of DOJ under the Fair Housing Act. The Department of Interior has referred several cases. Because of the recognition that transportation is an important issue to people with disabilities, DRS has actively sought referrals from the Department of Transportation. So far, it has received no referrals from DOT.

It is not clear whether cases kept at the designated agencies are resolved in a manner similar to that which would resulted if the case had been sent to DOJ. All the agencies prefer to pursue settlement in lieu of litigation, where possible, so it is difficult to assess whether a case handled at DOJ is more likely to establish a positive precedent than one at a designated agency. DRS believes there should be a steady stream of referrals to DOJ, even if the agencies are aggressive in their efforts to achieve voluntary compliance.

Under Title II, DOJ has no independent authority to involve itself in pattern or practice litigation issues that are within the jurisdiction of a designated agency. Thus, in the absence of sufficient referrals of Title II cases from the designated agencies, DRS has resorted to intervening in private litigation as a means of implementing its priorities. DRS is especially interested in intervening where it believes it can make a difference; for example, to assist an attorney who may not have ADA or disability rights law expertise. DOJ's policy is generally not to intervene in suits where the legal theories of the private counsel for the plaintiff and those of DOJ conflict.

DRS can initiate a Title II case if the complaint falls into the areas for which it has complaint-handling jurisdiction. Even so, there have been only two Title II cases in which DOJ has initiated lawsuits as plaintiff, and both of those cases were employment cases that were also covered under Title I and thus came by referral from the EEOC.

With respect to the Title III cases pursued for litigation, DRS staff members interviewed for this report felt that their choices were constrained by the complaints brought to them. Not as many supermarket cases as stadium or hotel cases have been pursued in litigation, they argued, because those complaints have not presented complex issues or issues that fall within their priorities. DRS tried to find private cases where it believed intervention or amicus participation might advance its priorities. It used its contacts with disability organizations and other knowledgeable persons, and monitors case law reporters as a means of learning about private litigation that might be of interest.

The quality of a case, whether it is a "good case," and whether the DOJ attorneys feel the Department is likely to win also influence the litigation decision. Several DRS staff attorneys interviewed expressed the view that they were cautious about which cases to take on so as not to create bad case law. They were concerned about the general hostility of the federal judiciary toward ADA and anxious not to lose on an issue they deemed important. Other staff members, however, expressed the view that too much concern about bad case law has played a role in discouraging litigation across the board, when it should have been only one factor in determining litigation choices.

Factors that support DOJ's undertaking more litigation include the fact that courts may give more deference to the DOJ attorneys, so that they may be more likely to win a case than if it were brought by a private attorney. Also, DOJ has more resources than individuals have to support litigation of complex issues; as one staff member said, "If we don't bring the case, who will?" Too much caution and too few cases reduce the chances for DOJ to produce change.

Private litigants expressed somewhat different views about DOJ's participation in their cases. The research team was told of several instances in which a private party had approached DOJ and requested that it join a lawsuit but got no definitive response. Later, after the case was fairly far along, DOJ suddenly showed interest and entered the case. Private litigants frequently have considerable interest in having DOJ participate in their lawsuits because of the greater resources and influence that DOJ participation can bring.

2.5.3 Process of Determining Cases to Litigate

The process for moving a case from investigation to litigation starts when an investigator finds it difficult to achieve a settlement agreement. At this point, the investigator generally consults with a DRS deputy. For this reason, by the time a case gets identified as a potential a one for litigation, a deputy is probably already familiar with the case. The case for litigation is made via a justification memo (J memo), written by an attorney with input from the investigator. A great deal of consultation takes place with the deputies, the section chief, and special legal counsel within DRS in this process of assessing a case for possible litigation. The J memo must be approved by the overseeing deputy and section chief before being sent on to the assistant attorney general's office for approval.

Following the consultation described above, a J memo must receive final approval from the "front office." Some staff members interviewed described occasions where, despite advance coordination, the front office was not interested in pursuing a case or disagreed about what legal theories to use in the case. Staff members interviewed attributed these disconnects to the different roles played by DRS, which functions more as an advocate for trying different kinds of cases, and the front office, which must make decisions with a view to overall policy priorities and constraints.

While J memos reportedly were rarely not approved, instances were identified in which staff prepared a J memo based on extensive investigation and case development, only to be told that the case would not be litigated or had "died" in the front office. At times, the J memo was returned to staff with a request for more work and pressure for settlement.

The slowness of the approval process was a real concern to some staff members interviewed, who noted that by the time some complainants under Title II are informed about a decision by DOJ, a very real danger exists that their statute of limitations will have expired. Although it did not involve a Letter of Finding, a private lawyer told of a complaint that was submitted in August 1997 that received no response from DOJ until August 1998. The response received indicated that DOJ would not investigate. By then, the statute of limitations in the complainant's state had elapsed.

2.6 DRS Litigation Record

As of February 1999, DRS had participated in 148 ADA cases in federal district court or at the federal appellate level. In 143 of the cases, DRS was plaintiff, intervenor, or amicus; in 2 cases, it was the defendant The distribution of litigation is displayed in Table 2-8.

Table 2-8

Litigation Role by ADA Title, Department of Justice (through May 1998)

Role	Title I		Title II		Title III	
	No.	%	No.	%	No.	%
Plaintiff	8	28.6	2	3.5	29	41.4
Intervenor	12	42.9	17	29.3	8	11.4
Amicus curiae	8	28.6	39	67.2	31	44.3
Defendant	0	0.0	0	0.0	2	2.9
Total	28	100.1	58	100.0	70	100.0

Source: U.S. Department of Justice, *ADA Cases Litigated by DOJ*, February 1999. Totals more than 148 cases because DOJ may take a new role in a case as it moves from District Court to appeal.

The distribution of cases clearly reflects the issues raised by the DRS staff members in interviews. DOJ is a plaintiff in a very small proportion of the Title II cases in which it has participated; mostly it has participated as amicus curiae. It is more often the plaintiff in Title III complaints.

Topics of the cases in which DOJ has been involved include

- Constitutional challenges to Titles I, II, and III (20 cases, most for Titles I and II and involving state sovereign immunity)
- Alterations and barrier removal in existing facilities under Title III (13 cases; 2 cases involved fast food chains, and several involved small or large hotels)
- Employment issues under Title I (10 cases, including issues of failure to hire or to accommodate, and illegal termination; 2 of these cases also raised the issue of whether employment is also covered under Title II)
- New construction under Title III (9 cases, including against one hotel chain in five districts; also includes 4 stadium line-of-sight cases aimed at owners and architects)
- ADA coverage of prisons under Title II (5 cases)
- Segregated institutional placements under Title II (5 cases)

- Refusal to provide medical or dental services or to provide auxiliary aids under Title III (5 cases)
- Questions about disability history or conditions on licensing exams and applications under Title II (4 cases)
- The possibility of damages under Title II (4 cases)
- Insurance as a covered public accommodation under Title III (3 cases)
- Issues involving the National Collegiate Athletic Association (NCAA) under Title III (3 cases, including 2 cases about students with learning disabilities)
- 9-1-1 emergency service accessibility under Title II (3 cases)

2.6.1 Settlements

Settlement is often considered a method of obtaining compliance with the law without the time, expense, and use of resources required in going to court. Executive Order 12988 (which applies to all components of the Civil Rights Division) requires that DRS work to give the other side an opportunity to settle. Starting with the investigation stage, every effort is made to reach a settlement with the respondent. A proposed settlement developed by an investigator as part of the investigative process must be approved by personnel higher up in the section. Cases that cannot be settled during the investigative phase may still be settled as the case moves toward litigation. Staff members expressed varying views regarding the use of settlements to advance ADA. To some extent, resource limitations prevent litigating all cases and create an impetus for DOJ to settle some cases where it is deemed appropriate. It is obviously critical that DOJ enter into settlements only when settlement will achieve ADA compliance and not compromise any rights or requirements ADA establishes.[36]

DRS has entered into approximately 400 formal settlement agreements since the enactment of ADA. In some of its early settlements, DRS did not consistently seek significant damages in these settlements. This was, in part, because, courts themselves were less inclined to grant large damage awards in the early years of the statute. In later settlements, however, DRS has made damage awards a routine requirement of settlement.

Some have criticized the use of settlement, because settlements do not have the same precedential value that successful court rulings have, and this is certainly true in a strictly legal sense. Many DRS settlements, however, have been viewed by the Department, the disability rights community, and public and private entities as model agreements stating the Department's view of how to achieve compliance with ADA. A settlement agreement with the Rochester, New York, police department, for example, spelled out the obligation to provide sign language interpreters and other forms of effective communication with persons who are deaf or hard of hearing for specific situations. Similarly, an agreement with the Empire State Building in New York City showed how to make a historic landmark accessible to people with disabilities and also showed how to apply ADA's "readily achievable" standard in removing barriers in existing facilities. Sometimes, formal settlement agreements by themselves make significant changes to a large segment of an industry. For example, the agreement with the Educational Testing Service changed the testing procedures for high school students with disabilities; the agreements with two major day care providers in the country, Petite Academy and Kindercare, opened up day care centers to children with diabetes and severe food allergies; and the agreement with the organizers of the 1996 Atlanta Olympic Games provided guidance to all stadium designers on how to make a new, large sports stadium accessible. In addition, people with disabilities use these formal agreements to bring about compliance in their own communities.

DOJ has recently begun to use mediation in settlements with chains. This strategy offers the possibility that one settlement will address a lot of complaints. A DRS attorney, however, expressed a reservation that mediation was inappropriate with chains with a lot of long-term violations. The attorney argued that these entities should have liquidated penalties (e.g., be required to pay a certain amount of money per time period day, week, month until the violation is corrected).

2.6.2 Damages

As noted in the previous section, DRS reports that it is seeking damages in its settlements and cases to a greater extent now than it had previously. There was some disagreement among staff members about the need to pursue damages more aggressively. Part of the issue is one of strategy—can the pursuit of damages work against DOJ in court if the respondent has changed its discriminatory practices? Concern about the hostile view of ADA held by some federal judges also seems to be one factor DOJ weighs in deciding the level of damages to seek in a given case. Depending on the facts of a given case, it may be more difficult to pursue damages if the respondent has agreed to remedy the violation.

2.6.3 Relationship with the Appellate Section

The Appellate Section of the Civil Rights Division is responsible for taking cases on behalf of the Department of Justice to the Courts of Appeals and files all amicus briefs for the Civil Rights Division. Each deputy chief of the Appellate Section is responsible for specific trial sections within the Civil Rights Division. Nonsupervisory attorneys within the Appellate Section do not formally specialize in ADA. However, as attorneys within the Appellate Section gain experience and expertise with ADA cases and issues, they tend to continue to take on such cases.

DRS and the Appellate Section report that they work collaboratively on appeals cases and amicus briefs. The assistant attorney general must obtain the approval of the solicitor general before the Appellate Section may participate in a case at the appellate level. In deciding whether to recommend participation to the assistant attorney general, the Appellate Section considers a number of factors, including the importance of the issue, the strength of the government interest in the case, the status of the case, whether filing a brief will aid the court, and the resources available for the case at the time the decision must be made. The Appellate Section also seeks the views of, and consults extensively with, the Disability Rights Section in developing its recommendation. When DRS and the Appellate Section disagree about the legal argument or whether a case should be appealed, each tries to persuade the other. If they cannot agree, the assistant attorney general decides the matter.

2.6.4 DRS's View of Its Accomplishments

Interviewers asked DRS legal staff members what they perceived as the key accomplishments of their ADA enforcement so far. In addition to the small changes they feel are being made every day, they identified the following areas that have come from settlements and litigation:

- Architect liability especially with regard to accessible stadium design
- Professional licensing especially with respect to mental health inquiries, testing issues, and coverage of people with learning disabilities
- Constitutionality of ADA
- Franchisor liability
- HIV work
- Prison coverage under Title II
- Barrier removal in major chains
- Access to 9-1-1 emergency services for people with hearing impairments
- Interpreters in courts
- Access to courts
- Car rentals

Policy positions taken by DOJ are discussed further in section 2.10.

2.6.5 Findings and Recommendations

Finding 10: DOJ (DRS) litigates relatively few cases. DOJ participates as amicus in more cases than it initiates as a party, and more DOJ cases are settled than are litigated.

- DRS litigation involves initiating cases as the plaintiff, intervening in private litigation, or participating as amicus curiae. DRS has not initiated a lawsuit as plaintiff in a single Title II case.
- DRS litigation has focused on chain entities (fast food restaurants, hotels) and on large entities in entertainment and recreation (stadiums, racetracks); some have

questioned whether these represent the most important issues that affect access in everyday life and participation in the community.

- Litigation activities have focused on ADA constitutionality questions and some important interpretive issues in the area of franchisors and funding and placement issues involving institutions; a broad vision for strategic litigation is not evident.
- Cases developed by DRS are more often settled than litigated. DRS should continue to use settlement where appropriate and should seek full remedies, including damages and civil penalties.
- DOJ's intervention in private litigation is sometimes too late to be helpful.

Finding 11: DOJ is cautious in its choices of ADA cases to litigate.

- DOJ cites a concern about creating bad case law as a reason for caution in pursuing ADA litigation.
- DRS has litigated in a variety of areas; many perceive this approach as avoiding hard issues and cases against big or powerful entities.
- Concern about negative media reaction, especially in the business press, appears to influence decisions about cases for litigation and positions in settlement negotiations.

Recommendation 11: DOJ should maintain the highest standards of vigorous ADA enforcement in deciding when and whether to settle cases.

Recommendation 12: DOJ should pursue a more aggressive program of litigation.

Such a program of litigation should include a focus on broad issues such as the state Nurse Practices Acts and entities representing institutions with which many people interact on a daily basis. DOJ should make a greater effort to initiate Title II cases, whether they involve covered entities under the sole jurisdiction of DOJ or are cases referred to DOJ after being handled by one of the designated agencies.

Recommendation 13: DRS should seek input from the disability community to obtain the views of people with disabilities regarding the prioritization of topics and issues for litigation.

As discussed in the text elaborating on Recommendation 6, the National Council on Disability believes that the Disability Rights Section has not given the disability community sufficient opportunities to provide input on ADA enforcement priorities. Increased opportunities could be achieved through town meetings, increased conference participation and other interactions. In particular, such input may help to identify particularly problematic or insufficiently addressed areas that may call for increased litigative attention by DOJ.

2.7 Staff and Mediator Training

After the passage of ADA, DOJ staff members were trained by other members of the staff and by outside disability rights advocates. Staff persons who would be involved with ADA attended a five-day training program on all titles of ADA, the regulations, and ADA standards for accessible design. As part of a contract with the EEOC and DOJ, the Disability Rights Education and Defense Fund (DREDF) conducted some of this training. Two three-day trainings were conducted in 1994, when DRS hired new technical assistance staff members.

DRS describes training as ongoing, with additional training sessions held on a periodic basis. Recent training includes a three-day session on Titles II and III for investigators, technical assistance staff members, and new attorneys, and two days of training on Title I provided to all DRS staff by the EEOC. A member of the investigative staff described training mostly as ongoing through consultations with other staff members. Attorneys on the DRS staff obtain additional training through the D.C. Bar Association annual ADA Enforcement and Compliance Update.

The Civil Rights Division has also offered training to the U.S. attorneys' offices on two occasions, in September 1995 and March 1998. In 1998, personnel from 50 offices attended. DRS participated in this training and distributed some materials on ADA. The U.S. attorneys have also received interactive video training on 9-1-1 service requirements. Additional training of the U.S. attorneys happens in the course of technical assistance to them.

The Key Bridge mediators have received ADA and disability training. Generally, this has been a one-day training on ADA. Key Bridge management staff may also make available additional information as its supervises the activities of the mediators. DRS acknowledges that one day of training on ADA is not enough; it does, however, express confidence in the guidance offered by Key Bridge.

DOJ was also involved with the EEOC in a train-the-trainers program conducted by DREDF and targeted at the disability community. This training occurred in 1991 and 1992. DOJ has not engaged in any training aimed at community members since then.

2.8 Technical Assistance

One of the units within DRS is the Technical Assistance Program. It provides technical assistance through several avenues:

- ADA Information Hotline
- An ADA home page
- The development and dissemination of technical assistance documents
- A speaker's bureau
- A traveling ADA display
- A technical assistance grants program
- Interagency coordination

The technical assistance function is performed by a staff that includes 10 specialists who answer the hotline, an architect (who is responsible for the Web site and technical aspects of the materials), and four administrative staff in addition to the unit supervisor. Each of the administrative staff members has a different area of responsibility (e.g., hotline supervision, mediation and congressional liaison, interagency coordination, and speakers bureau and publication oversight). All technical assistance staff are located in Washington, D.C. DRS has no regional technical assistance staff, although some of the DOJ contractors who provide technical assistance are in other locations, and the Disability Business Technical

Assistance Centers (DBTACs), funded by the National Institute on Disability and Rehabilitation Research (NIDRR), are spread across the nation on a regional basis.

DOJ has provided technical assistance since the inception of ADA because the act explicitly charged DOJ with the responsibility for providing technical assistance and working in cooperation with the other federal agencies involved in ADA enforcement to develop a technical assistance plan. In FY 1999 the budget for technical assistance was $3 million.

- *Written materials*

The initial focus of DOJ technical assistance was the development of written materials that described ADA and its requirements. Among the first documents developed by DOJ were the Technical Assistance Manual and a series of brief descriptions of the various titles of ADA in question-and-answer format. DOJ funded the development of technical assistance (TA) materials through its TA grant program between 1991 and 1996. Of note were grant-funded TA efforts targeted to various categories of covered entities; the Department worked with national trade associations and others to develop and disseminate ADA materials tailored to meet the needs of specific audiences, including hotels and motels, restaurants, grocery stores, small businesses, builders, students and professors of design education programs, members of historic preservation boards and commissions, medical professionals, child care providers, service providers for older people, mayors and town officials, police officers, court personnel, managers and operators of emergency 9-1-1 centers, and others. DOJ also supported a technical assistance contract awarded by the Equal Employment Opportunity Commission that developed materials and trained disability rights advocates. Contractors and grantees developed a wide variety of TA materials, some general, some targeted to specific entities (e.g., city governments), and some targeted to particular populations (e.g., architects and builders, people with disabilities). In more recent grant projects, DOJ has worked with state-based organizations to educate small business owners and state and local government officials about ADA and sources of information available to assist them in compliance. In the first year that grants were awarded, grantees were required to make their ADA technical assistance materials available in standard print as well as in alternate formats to serve anticipated demand. Grantees were responsible for disseminating their own materials to their constituencies. In the first round of grants, grantees were not required to provide any copies to the Department of Justice, in either standard print or alternate formats. In subsequent years, grantees were required to provide a specified number of copies to DOJ in both standard print and alternate formats. DOJ reproduced many of these grant materials for additional dissemination. Many materials are available in Spanish as well as English, and some are available in approximately 10 other languages. As of February 2000, DOJ had developed and published 40 TA documents and regulations and 23 status reports in standard print and alternate formats; DOJ has also funded the development of 124 publications and 22 videotapes through grants.

DOJ has used a variety of methods for distributing the TA documents it has developed itself or has had produced under contract. The Technical Assistance unit of DRS in Washington oversees the distribution of these materials. DOJ issues reprints and prepares updates of many of its own documents so they are available for distribution. Materials produced under the initial grants and contracts are available until they run out, unless DOJ decides to produce more copies. DOJ has authority to reproduce those materials, but because many are copyrighted, other organizations cannot duplicate them for distribution. For most documents, DOJ distributes what it has until they are gone. Thus, many of the materials produced by grantees are no longer available.

In order to make its ADA technical assistance materials and grantee-produced ADA materials available locally, DOJ funded a project in 1993 to place these materials in 15,000 local public libraries. Through this three-year grant, DOJ placed 29 of its own TA publications, 42 TA publications and one videotape developed by grantees, and 16 publications developed by other federal agencies and their grantees. Through this project, DOJ disseminated over 1.3 million ADA TA publications, including 645,000 grantee-developed materials.

The Department also reproduced and disseminated copies of grantee-produced materials (as well as DOJ materials) in targeted mailings to all chambers of commerce, all

Centers for Independent Living, all U.S. attorneys' offices, architectural libraries in colleges and universities, mayors of medium and large-sized cities, and others. DOJ has also provided grantee materials (as well as DOJ materials) to opposing parties for dissemination to their franchisees, subsidiaries, or other constituencies as a term of settlement.

Under one of its ongoing outreach initiatives, DOJ reports that it has sent seven notices to over 6 million businesses which provided information on the requirements of ADA and how to obtain free ADA publications; announced the toll-free ADA Information Line and other federal and federally funded ADA information services; highlighted tax credits and deductions available to assist businesses in complying with ADA; announced *ADA Guide for Small Businesses*; announced a new publication on *Restriping Parking Lots*; and provided information about tax credits and deductions that can assist businesses in complying with ADA. Responses to these initiatives have at times been impressive. In response to one of these mailings, DOJ received more than 80,000 orders for its new *ADA Guide for Small Businesses* in less than three months.

The remainder of the grantee materials that were reproduced by DOJ are currently being disseminated in bulk through the Disability and Business Technical Assistance Centers (DBTACs) and Centers for Independent Living (CILs) and individually through ADA Information Line's ADA Publication-of-the-Month. In the past year, DOJ has disseminated more than 241,000 copies of these documents in bulk to the CILs and DBTACS. DOJ reports that it does not have the resources to reproduce, stock, and disseminate all grantee documents individually on a continuing basis.

The Technical Assistance unit reports that in FY 1995, it distributed 7.5 million items; and in FY 1998, 8.3 million items. A large proportion of ADA technical assistance materials are sent by mail. Additionally, DRS now has an automated fax-on-demand system that operates 24 hours a day to respond to requests. Some documents are also available on the ADA DRS Web site and can be downloaded directly. The ADA Hotline is one of the key avenues for placing a request for materials to be sent by mail or by fax.

Recently, DRS has changed its strategy for the development of TA materials. DRS has decided to produce these materials primarily in-house. One reason is that DRS staff members have devoted much time to reviewing for accuracy the technical assistance materials produced by outside organizations. DRS staff members review nearly all the publications of the DBTACs, and they also review many documents produced by other federal agencies. Recent experiences with extensive reworking of materials produced by outside groups has convinced DRS that it will be more efficient to produce the materials itself. A second reason is the desire to produce more brief and targeted TA materials, rather than large and highly technical documents. DRS Technical Assistance staff members feel that while many of the early ADA technical assistance documents produced are still accurate, they are too technical, and what is needed now are more "reader friendly" documents aimed at specific audiences. An example of this is a targeted mailing to 500 small museums, including a letter from the Acting Assistant Attorney General Bill Lann Lee. Finally, the budget for technical assistance grants and contracts is not as large as it used to be. Some of those funds have been reallocated to technical assistance staffing within DRS, including staffing ADA Hotline, and to dissemination.

In addition to technical assistance with a special focus, DOJ/DRS has published since July 1993 a general report on a quarterly basis called *Enforcing ADA*. These reports describe DOJ's litigation, and formal and informal settlement agreements, and provide contact information for technical assistance and ADA complaints. The reports are available in paper and can also be downloaded from the Web site.

- *ADA Hotline*

DRS operates a telephone hotline for ADA questions at its Washington, D.C., office. The DRS hotline is staffed by 10 technical assistance employees. The hotline is available Monday-Friday, 10 a.m.-6 p.m. (Eastern time), except for Thursday, when it is available 1-6 p.m. The shortened Thursday schedule is to allow for staff meetings. The hotline has both voice and TDD numbers. DRS provides Spanish language translation services. Some information about hotline callers is tabulated. DRS reports that it has received an average of

105,000 to 110,000 calls annually over the past five years. In FY 1995, DRS received 73,000 calls; in FY 1997, it logged in 163,000 calls; and in FY 1998, it received approximately 120,000 calls. Approximately 63 percent of the callers were people with disabilities or relatives or disability advocates. Callers' inquiries included[37]

- questions about whether certain entities are covered under ADA (15%)
- referrals to other agencies (20.5%)
- requests for materials (16%)
- information on how to file a complaint (10%)

The topics involved in the inquiries included

- new construction/alteration standards (10.5%)
- auxiliary aids/effective communication (2.5%)
- barrier removal (4%)
- complaint status (3%)
- program access (4%)
- policies (5%)
- miscellaneous (10%)

DRS reports that, over time, the proportion of calls that need to be answered by specialists has increased. Questions about curb ramps, stairways, and other architectural issues have increased. Because many of these questions require consultation with the architects or attorneys, the caller may be called back.

The hotline takes questions in the order in which they are received. DRS reports that the average wait for callers is 2 to 2½ minutes. Its phone system does not provide callers an estimate of how long, based upon the size of the queue, should expect to wait. The DRS ADA hotline does not allow callers to leave a message for a return call but plays a recording that advises callers when there is a queue and suggests that they may want to call back later. DRS believes that it would be too time-consuming to try to reach callers and that its approach allows it to handle a higher volume of calls than would be possible if specialists spent time returning calls. In order to handle the volume of callers most efficiently DOJ makes staff available to handle calls during normal business hours on the east coast and accepts voice mail orders for materials and offers a fax-on-demand service 24 hours a day. The Department believes that the approach of having larger numbers of staff available during fixed hours, combined with taking orders for publications and the fax-on-demand service 24 hours a day, allows DOJ to handle a large volume of callers while keeping the wait-times to speak to specialists as low as possible. Although their primary responsibility is taking calls during assigned hours, these staff members also research issues and follow up on calls they have received, mail out requested materials, handle bulk and targeted mailings, and handle other technical assistance activities.

DRS did not collect data on hotline calls for several years but recently instituted data collection using some newly added technology. The new system obtains information on issues and topics about which callers are seeking help and tracks whether the calls concern Title II or Title III matters. DRS does not conduct consumer satisfaction surveys regarding its ADA hotline, citing in part disfavor of such surveys under the Paperwork Reduction Act. DRS staff members attributed weaknesses in the manner of operation of the DRS hotline to fiscal constraints within DRS (e.g., not enough staff for returning calls if messages were taken).

For several years, DOJ has awarded a grant to the Disability Rights Education and Defense Fund (DREDF) to operate its ADA Hotline in recognition of what DRS calls DREDF's reputation and expertise in the field of disability rights law, as well as its different hours of operation that allow for calls at times after business hours on the east coast. DOJ has also funded other ADA hotlines through grants. DOJ provides information about grantees' and other agencies' hotlines in a publication entitled *ADA Information Services*. This publication is updated regularly and is available on DOJ's ADA Web site as well as through ADA Information Line. DOJ also includes information about DREDF's and other hotlines in the quarterly status reports entitled *Enforcing ADA*. In addition, ADA Information Line staff routinely refer callers to DREDF regarding issues that they believe DREDF is best suited to handle. The messages that callers to DOJ's hotline hear while they are on hold or after hotline business hours do not inform them that they can also try the DREDF hotline (nor does the Web site that lists the DOJ hotline numbers include the DREDF hotline number). DREDF's hotline has a message-taking feature, and, pursuant to contract terms, DREDF compiles annual statistics regarding the use of the hotline and surveys consumers about their satisfaction. DREDF receives approximately 10,000 calls per year for technical assistance.

- *ADA Home Page*

The Disability Rights Section created and manages an ADA Web site titled the "ADA Home Page." The Web site became operational in July 1996. Considerable thought went into formatting the Web site to ensure that it is accessible to all kinds of users, including those with old and slow computers or modems and those with visual impairments who require text format. With that in mind, the graphics are kept to a minimum. The Web site has approximately 70,000 visitors per week, from all over the world. In 1998, the ADA Web site had 3,640,000 visitors; this mushroomed to some 6 million visits in 1999.

The Web site provides visitors with much useful information, including how to contact ADA hotline, a list of ADA technical assistance documents, ADA regulations and information about newly proposed or issued regulations, information about building code certification, a complaint form for Title II or III complaints (to be printed and mailed, not e-mailed), and information on settlements. The Web site contains all current technical assistance publications as well as information on settlement agreements and links to TA letters and press releases and other federal agencies' ADA Web sites. Additional information that it would be useful for the Web site to make available includes statistics on complaint processing (similar to the EEOC reporting on the nature of complaints and complainants and on complaint resolution) and summary data on the litigation docket. So that the enforcement of ADA can be assessed in the context of overall civil rights enforcement, it is also important that the Civil Rights Division as a whole (or each of the sections) publish comparable statistics regarding litigation and enforcement efforts regarding the various types of discrimination prohibited by federal civil rights laws.

- *Interagency coordination*

DOJ is responsible for coordinating and oversight of ADA technical assistance across the various federal agencies. To implement this responsibility, DOJ set up a Technical Assistance Working Group, composed not only of the agencies charged with primary enforcement of ADA (DOJ, the EEOC, DOT, and the FCC), but also of agencies with related interests or responsibilities. Additional agencies involved include the Access Board, the National Council on Disability, the President's Committee for the Employment of People with Disabilities, the Small Business Administration, the Disability Business Technical Assistance Centers (DBTACs), the National Institute on Disability and Rehabilitation Research (NIDRR), and the Department of Commerce. In the early years of ADA, this group focused on sharing information. Currently, approximately 22 agencies participate in what is now called ADA Technical Assistance Coordinating Committee. The group meetings now occur on a quarterly basis and are focused on a specific topic, agenda, or presentation.

- *Outreach*

DRS has made some efforts, especially in recent years, to ensure that persons from diverse cultural backgrounds and rural communities have access to ADA technical assistance and public information materials. Among the targeted activities are exhibitions and presentations about ADA at conferences and meetings of organizations from these communities, such as the Black Deaf Association, the National Council of La Raza, the Urban League, the National Association of Black Social Workers, the Organization of Chinese Americans, Inc., and the Alaska Black Caucus. In 1997, DRS sent letters enclosing ADA technical assistance materials to over 500 Native American tribal government offices. Other efforts to reach rural areas have included public service radio and television announcements by the president and attorney general in 1995, and the distribution of ADA materials to local libraries across the country. In 1997, information about ADA Information

Hotline and ADA was published in *Parade Magazine*, which reaches 80 million people. Outreach has also included coordinating distribution of technical assistance activities and materials with the regional DBTACs, the President's Committee on the Employment of People with Disabilities, and Centers for Independent Living. In addition, two technical assistance grants were for projects to target rural and culturally diverse populations.

Technical assistance plans for the next five years include continuing to support and build the services of ADA Information Hotline, the ADA Home Page, and the speakers bureau, and the development of new publications. The efforts will focus particularly on small businesses, culturally diverse and rural populations, and educating the public about the standards for children's facilities, legislative and judicial facilities, penal facilities, and the standards adopted from the Access Board revisions of the ADA Guidelines. There are also plans to develop CD-ROMs that will contain technical assistance materials, including photographs, video, and sound illustrations of aspects of the standards.

2.8.1 Findings and Recommendations

Finding 12: DOJ has engaged in various public education and technical assistance efforts regarding ADA.

- Principal modes of technical assistance include the ADA Information Hotline, an ADA Home Page, the development and dissemination of technical assistance documents, a speakers bureau, a traveling ADA display, a technical assistance grants program, and interagency coordination.
- An accessible ADA Web site contains information about how to contact ADA hotline, a list of ADA technical assistance documents, ADA regulations and information about newly proposed or issued regulations, information about building code certification, a complaint form for Title II or III complaints (to be printed and mailed, not e-mailed), and information on settlements, as well as all current downloadable TA publications, reports and information on settlement agreements, and links to TA letters and press releases and other federal agencies' ADA Web sites.
- Technical assistance publications include materials written by DOJ, publications produced under contract with other groups, and publications produced in coordination with other federal agencies. DOJ distributes these materials until

they run out. Some materials from earlier contracts with outside groups are no longer available; others are available from the original source.

Recommendation 14: DOJ also should publish the following information on its ADA Web site:

- Statistics on complaint processing (similar to the EEOC reporting on the nature of complaints and complainants and on complaint resolution)
- Summary data on the litigation docket
- Statistics about litigation and enforcement efforts of the Civil Rights Division as a whole (and each of the sections), directed to the various types of discrimination prohibited by federal civil rights laws.
- The DREDF ADA hotline number

2.9 Media Contact

DRS reports that it monitors media commentary on ADA and that incorrect or inflammatory stories about ADA arouse the attention of DRS staff members and persons in the front office. DRS usually convenes a meeting to discuss the problematic story and to devise a strategy for responding. The section seeks to avoid having any incorrect reports go unchallenged. DOJ admits this process is reactive and that often the reaction gets less attention than the initial, more sensational report.

The Department reports that it also receives hundreds of calls a year from the media, including the mainstream press (print, TV, and radio), the trade press, and the disability press. The Division responds to these press inquiries in a number of ways, including answering questions, providing technical assistance, and granting interviews.

More proactive efforts include press releases, radio spots, and TV public service announcements. When DOJ settles a big ADA case or initiates a significant ADA lawsuit, it issues a press release. These press releases are also posted on ADA Home Page. Attorney General Reno has produced TV public service announcements about ADA. In 1997, President Clinton recorded a public service announcement regarding ADA that the Department sent to 4,000 radio stations across the country. In July 1995, Attorney General

Reno and former Attorney General Thornburgh wrote an op ed piece on ADA that appeared in the *Wall Street Journal*. Also in 1995, DRS published "Myths and Facts About ADA" to address criticism of ADA. That technical assistance piece was widely distributed to the press and others and is still available on The ADA Web site, through ADA Information Hotline and through DOJ's fax-on-demand system.

The Department vigorously responded to the U.S. Advisory Commission on Intergovernmental Relations Report (ACIRR) on ADA in 1996. Attorney General Reno sent a letter outlining serious objections to the content of the report. That letter was widely circulated to government entities and the disability community. The ACIRR subsequently dropped the report's recommendations.

The assessment of these types of activities within DRS is that DOJ has been proactive in its defense of ADA but that more could be done; there is some concern that DOJ must tread a fine line, since it is an enforcement agency. Members of DRS staff suggested that both DOJ and the EEOC should engage in more proactive activity in relation to media coverage of ADA, and that the two agencies should collaborate more in both proactive and reactive efforts to work with the media on ADA issues.

2.9.1 Findings and Recommendations

Finding 13: DOJ has not done enough in its public defense of ADA

DOJ has not engaged in an aggressive, positive media effort to combat negative and inaccurate portrayals of the requirements and intent of ADA.

2.10 Policy Positions and Leadership

Previous sections discuss the processes and mechanisms by which DOJ takes positions on policy matters arising under ADA. These include, in particular, setting policy by issuing regulations (discussed in section 2.2.1), technical assistance activities (discussed in section 2.8), and the selection and implementation of litigation priorities (discussed in section 2.5). This section examines the substantive content of DOJ policy decisions and the leadership the agency has shown in promoting effective and vigorous implementation of the requirements of ADA.

2.10.1 Accomplishments

In a number of instances, DOJ has furthered the goal of effective and enlightened implementation of ADA by taking strong and appropriate stances on issues. Some such positions were taken at the time DOJ issued ADA Title II and Title III regulations in July 1991. Subsequent to the promulgation of the regulations, DOJ has taken constructive policy positions, primarily in the context of litigation.

The Department of Justice has interpreted Title II broadly to cover all the activities of state and local governments, and has advocated this position in litigation. In *Pennsylvania Department of Corrections v. Yeskey,*[38] DOJ filed an amicus brief arguing that the broad language of Title II clearly covers prisons and provides no basis for distinguishing programs, services, or activities of prisons from those provided by other public entities. In a unanimous opinion, the Supreme Court agreed with DOJ's arguments and ruled that a motivational boot camp operated for selected inmates by the Pennsylvania state prison system is subject to the requirements of Title II of ADA. DOJ has also participated successfully as amicus curiae in several cases in which the U.S. Courts of Appeals have interpreted Title II coverage broadly. In *Gorman v. Bartch,*[39] the Court of Appeals for the Eighth Circuit ruled, consistently with the Department's contention, that arrest procedures—specifically the alleged failure by Kansas City, Missouri, police to properly transport a wheelchair user who was arrested, causing him to suffer neck and shoulder injuries—are covered by Title II. In *Crowder v. Kitagawa,*[40] the U.S. Court of Appeals for the Ninth Circuit agreed with DOJ's contentions that Title II of ADA covers Hawaii's rabies quarantine system, which imposed a 120-day quarantine on carnivorous animals entering the state, including guide dogs, and that the district court should consider whether plaintiffs' suggested alternatives to the quarantine would be reasonable modifications under ADA. The case was later resolved through a settlement agreement instituting a vaccination system in place of the quarantine. In *Innovative Health Systems, Inc. (IHS) v. City of White Plains,*[41] the U.S. Court of Appeals for the Second Circuit ruled, consistent with arguments presented in an amicus brief filed by the U.S. attorney for the Southern District of New York, that Title II covers all the activities of state and local governments, including zoning practices; the court also ruled that the plaintiff organization was entitled to a preliminary injunction. DOJ has filed numerous briefs arguing that compensatory damages are available for persons with disabilities for injuries resulting from violations of Title II by public entities.[42]

DOJ has actively advocated for a broad and inclusive interpretation of Title III coverage of public accommodations. The Department has filed amicus briefs in which it argued successfully that the National Collegiate Athletic Association (NCAA) is covered by Title III;[43] contended successfully before the Ninth Circuit in support of Casey Martin, a professional golfer with a rare disability that limits his ability to walk, that Professional Golfers Association (PGA) policies affecting competition on the fairways and greens are covered by Title III, even though PGA events operate with controlled access and selective admissions criteria; supported litigants seeking to establish that Title III covers disability-based discrimination in the terms and conditions of insurance policies;[44] and contended that Title III of ADA covers cruise vessels when they are in the ports or other internal waters of the United States, even if they are registered in a foreign country.[45] In May 1999, DOJ entered into a significant settlement agreement with Avis Rent-a-Car, Inc., treating all Avis shuttle bus systems as "fixed route system" and requiring Avis to make them readily accessible to and usable by individuals who use wheelchairs.[46] In an earlier agreement, Avis had agreed to provide vehicles equipped with hand controls at no extra charge and to permit customers with disabilities to be financially responsible for car rentals without documenting their disabilities, as long as they are accompanied by a licensed driver.[47] In January 1995, Dollar Rent-a-Car entered into a similar agreement regarding the latter issue, permitting a person with a disability unable to drive a vehicle to rent a car for a licensed companion to drive.[48]

The Department has interpreted the "most integrated setting appropriate" requirement in its Title II regulation as prohibiting the unnecessary segregation of people with disabilities in institutional settings. This position was urged by DOJ as amicus and adopted by the Supreme Court in *Olmstead v. L.C.*,[49] where the Court upheld the ruling of the U.S. Court of Appeals for the Eleventh Circuit that Georgia may have violated ADA by confining two individuals with mental disabilities in an institution rather than providing services through a community-based program as recommended by the state's treating professionals. In finding that unjustified isolation is a form of discrimination under ADA, the Court pointed to the stigma of unworthiness and the unequal access to family and social interaction, employment, education, and cultural enrichment that result from unnecessary institutionalization. Years earlier, DOJ had successfully argued a similar view in its amicus participation in the Third Circuit case of *Helen L. v. Didario.*[50] In *Didario*, the U.S. Court of Appeals for the Third Circuit ruled in 1995 that the failure of the Pennsylvania Department of Public Welfare to provide home attendant care services, that, in the circumstances of the case, forced the plaintiff who had a mobility impairment to enter a nursing home even though she did not need nursing care, violated Title II.

DOJ has interpreted ADA's regulation against eligibility criteria that unnecessarily screen out individuals with disabilities to prohibit unnecessary inquiries by licensing authorities into an applicant's or licensee's disability. By challenging overly broad mental health inquiries by state licensing officials of applicants for professional licenses (law and medicine), the Department has spurred reform efforts nationwide. In briefs filed in cases in New Jersey, Florida, and Virginia, the Department has argued that broad questions about an individual's history of treatment or counseling for mental, emotional, or nervous conditions that do not focus on current impairment of an applicant's fitness to practice in a given profession violate ADA. In *Clark v. Virginia Board of Law Examiners*,[51] for example, DOJ filed an amicus brief supporting a challenge to inquiries into past treatment for mental illness made by the Virginia Board of Bar Examiners in certifying candidates for admission to the Virginia Bar. The court ordered the Virginia Board of Bar Examiners to stop asking bar applicants whether they had received counseling within the past five years.

The Department has interpreted ADA's requirement of making reasonable modifications in policies, practices, and procedures of both state and local governments and places of public accommodations as applying broadly in a wide variety of settings. DOJ has contended that the use of driver's licenses for identification purposes excludes those who do not drive because of disability. In *U.S. v. Venture Stores, Inc.*,[52] the Department entered into a consent decree resolving its lawsuit against Venture Stores, Inc., a St. Louis, Missouri, firm that operates more than 90 discount department stores in eight states. Venture agreed to modify its policy of permitting only customers with drivers' licenses to pay for merchandise with a personal check and will now permit individuals who do not drive because of a disability to pay by check if they have a nondriver state ID card. In *U.S. v. Law School Admission Council, Inc.*,[53] the Department filed suit against the Law School Admission Council for not making reasonable modifications in policy to allow individuals with physical disabilities in appropriate cases to have additional time to take the Law School Admission Test (LSAT). The lawsuit is currently pending in the U.S. District Court for the Eastern District of Pennsylvania. DOJ has undertaken actions against several child care centers and chains of child care centers to require them to alter policies and practices that cause the exclusion of children with disabilities.[54] In *Alvarez v. Fountainhead, Inc.*,[55] for example, the U.S. District Court for the Northern District of California ordered a California child care center to modify its "no medications" policy and enroll a child who has asthma and uses an inhaler. DOJ argued in an amicus brief in support of the child that the minimal monitoring and supervision required in this case would be reasonable and not fundamentally different from the responsibilities that all child care operators have for the safety and well-being of other students.

DOJ has taken an unequivocal stance that privately owned businesses that serve the public—such as restaurants, hotels, retail stores, taxicabs, theaters, concert halls, and sports facilities, and all state and local government agencies must allow people with disabilities to bring their service animals onto business and government premises in whatever areas customers and the general public are generally allowed. The Department has also been clear that covered entities cannot impose a deposit or a surcharge on an individual with a disability as a condition to allowing a service animal to accompany the individual, even if deposits are routinely required for pets. These policies have been promoted in numerous settlement agreements and in a guidance document in the form of a July 26, 1996, letter signed by the assistant attorney general for civil rights and the president of the National Association of Attorneys General, accompanied by a list, with responses, of "Commonly Asked Questions About Service Animals in Places of Business." These documents are available on the DOJ Web site (http://www.usdoj.gov/crt/ada/animal.htm). Similar versions of these documents, with state-specific requirements, were distributed by 24 state attorneys general to associations representing restaurants, hotels and motels, and retailers for dissemination to their members. The documents were prepared by a disability rights task force established by the Civil Rights Division and the National Association of Attorneys General.

In a similar vein to the DOJ documents regarding service animals (but weaker because unaccompanied by letters from the assistant attorneys general for civil rights and states' attorneys general), DOJ's ADA Web site contains several documents that provide non-binding guidance on specific matters. These include a one-page description of the obligations of gasoline service stations with regard to equal access to gas pumps,[56] a design guide regarding restriping parking lots,[57] a three-page description of key accessibility requirements applicable to new stadiums,[58] and a list of questions and answers about child care centers and ADA.[59] The policy positions taken in these documents are constructive; they would have been even more commendable if they had been issued as formal, binding statements of regulatory guidance.

The Department of Justice has participated in a series of cases that have established legal principles that persons with asymptomatic HIV disease are persons with disabilities under ADA and that treating a patient with HIV disease in the dental setting does not pose a direct threat to the health and safety of others.[60] The leading such decision is *Bragdon v. Abbott*,[61] in which the Supreme Court decided that asymptomatic HIV status is a disability under ADA. A dental patient, infected with HIV but with no outward symptoms of the disease, filed suit when she was denied treatment by a dentist. The Supreme Court agreed with the amicus brief filed by the Department of Justice and upheld the U.S. Court of Appeals for the First Circuit in a 5-4 decision. The Court found that asymptomatic HIV status met all the requirements under the statutory definition of a disability: it is a physical impairment (from the moment of infection), it impairs the major life activity of reproduction, and it "substantially limits" that activity. The court also emphasized that is conclusion was consistent with the Department of Justice's views on this issue as expressed in its regulations and technical assistance manual. The Supreme Court sent the case back to the Court of Appeals for further review of the evidence as to whether the plaintiff's HIV infection posed a "direct threat" to the dentist's health. On remand, the U.S. Court of Appeals for the First Circuit reaffirmed its earlier ruling that Dr. Bragdon violated ADA by refusing to fill a cavity because of the patient's HIV infection.[62]

To ensure that ADA remains effective nationwide, the Civil Rights Division routinely intervenes in cases in which the constitutionality of Titles II or III is challenged. DOJ has defended the constitutionality of ADA's abrogation of state sovereign immunity under the Eleventh Amendment in many actions. Most courts have held that in enacting Title II, Congress was exercising appropriate authority under its constitutionally granted power to enforce the Fourteenth Amendment and that Congress has authority to abrogate the states' sovereign immunity when acting pursuant to its Fourteenth Amendment power. The Department has also defended Congress's power to require that states voluntarily waive their sovereign immunity under Section 504 and IDEA by accepting federal funds. DOJ has argued that Congress may require such waiver under Section 504 and IDEA pursuant to its power under the Spending Clause and that the conditions imposed on states by those statutes are not coercive. The vast majority of courts have upheld the abrogations of immunity in ADA, Section 504, and IDEA, but the authority is not unanimous, and the question is still unsettled in many jurisdictions.[63] It appeared that the Supreme Court of the United States was about to address these issues when the Court granted certiorari in the cases of *Florida Department of Corrections v. Dickson*[64] and *Alsbrook v. City of Maumelle*[65] in early 2000, but these case were settled before the Court heard them. On April 17, 2000, the Supreme Court granted certiorari in the case of *University of Alabama at Birmingham v. Garrett,*[66] which raises the issue of the constitutionality of Titles I and II of ADA insofar as they authorize suits for monetary damages against the states. The Court is expected to hear arguments in the case in its next term, which begins in the fall of 2000.

DOJ has successfully fought several challenges to the constitutionality of Title III under the Commerce Clause. In these cases, courts have upheld ADA as a valid exercise of Congress's Commerce Clause power to regulate interstate commerce.[67]

The Department has devoted substantial effort to ensuring that state and local governments provide public services that ensure effective communication with people with disabilities. DOJ has sought to require effective communication access to various types of services, including emergency 9-1-1 services,[68] court proceedings,[69] interactions with the police,[70] in jail and prison settings,[71] local governmental proceedings,[72] and government training programs.[73] DOJ has also taken action to ensure that places of public accommodation provide appropriate auxiliary aids for people with communication-related disabilities in a variety of contexts, including health care,[74] licensing examinations and preparation for such examinations,[75] and recreation venues.[76]

The Title III new construction accessibility requirement lists as a form of discrimination prohibited under the act "a failure to design and construct facilities for first occupancy ... that are readily accessible to and usable by individuals with disabilities...."[77] DRS interprets this provision as covering architects, franchisors, and contractors insofar as they participate in the design or construction of new buildings, rendering them liable for their participation in the design and construction of any new building that does not comply with ADA. DOJ has pursued that interpretation in several lawsuits, some involving architects and others involving both architects and franchisors. The courts have been split on this question, but the Department has prevailed in the Eighth Circuit and in several United States district courts.[78] In December 1999, DOJ announced a nationwide settlement with franchisor Days Inn, resolving all outstanding litigation, including the franchisor's liability for ADA violations at its franchised locations that are newly constructed. Days Inn agreed to provide a $4.75 million revolving fund to help franchisees pay for remediations at hotels that were built in violation of ADA. DOJ continues to litigate the issues surrounding Title III coverage of architects, contractors, and franchisors. In a recent example, DRS has filed suit in California against architecture firms that DRS alleges designed stadium-style movie theaters in violation of accessibility standards of ADA. The section has also filed suit against major theater chains in which it alleges violations of the new construction requirements in both traditional and stadium-style theaters. It participated as amicus in a case in Texas in which the district court found that Cinemark, Inc., had violated ADA new construction standards in certain stadium-style theaters.

2.10.2 Shortcomings

The previous section describes a number of examples of admirable policy positions DOJ has taken in interpreting ADA and advocating the effective implementation of its requirements. In some other instances, the agency's policy positions have been less satisfactory. Certainly DOJ has not in every instance achieved maximal results on all settlement issues. An attorney in a Title II case described a situation in which DOJ had taken a position inconsistent with the attorney's (ultimately successful) litigation strategy after having belatedly become involved in the suit. Another described a case in which DOJ intervened in a pending case and then commenced negotiations with the defendants without consulting the plaintiffs' attorneys. Another advocate was quoted voicing strong criticism of DOJ for failing to take action when Boston University allegedly dismantled its program for students with learning disabilities.[79]

Some particularly vehement complaints about DOJ performance focus on deficiencies in carrying out its responsibilities to address deprivations of rights of institutionalized persons under the Civil Rights of Institutionalized Persons Act (CRIPA). Much of the disapproval has focused on the Special Litigation Section (SLS) of the Civil Rights Division, which has enforcement authority under CRIPA. Critics charge that SLS interprets the Supreme Court's decision in *Youngberg v. Romeo*[80] too restrictively to limit SLS litigation activities to minimal safety, bodily liberty, and habilitation issues, while ignoring other broader rights recognized by lower courts in other cases, with the result that DOJ litigation objectives focus on improving institutions rather than challenging the confinement of individuals in segregated facilities or seeking training and habilitation services designed to return individuals to the community. In addition, DOJ/SLS is charged with litigating too few CRIPA cases, with taking too long to do so, and with accepting consent decrees and settlement agreements that do not fully reflect and implement the rights of institution residents.

In an official response to a review draft of this report, DOJ contended that SLS has a strong enforcement program under CRIPA of protecting and promoting the federal constitutional and statutory rights of individuals in public nursing homes, psychiatric hospitals, and mental retardation facilities. Contrary to criticisms that SLS's efforts have focused on improving institutions, DOJ asserted that in addition to obtaining injunctive relief to remedy unlawful conditions in institutions, SLS also has investigated, made findings, and obtained relief, and is litigating a variety of issues related to unlawful confinement and inadequate community services, including vigorous enforcement of individuals' rights under ADA integration regulation. DOJ denies that SLS has adopted a restrictive interpretation of *Youngberg* and states that SLS has consistently used the *Youngberg* standard to make constitutional claims of inadequate discharge planning and failure to provide habilitation services and treatment designed to return individuals to the community.

Apart from CRIPA, state residential facilities are also subject to Title II of ADA. Under Title II, however, investigations of complaints against states alleging violations of ADA's integration mandate fall under the jurisdiction of the Office of Civil Rights at the Department of Health and Human Services (HHS). Once HHS receives a complaint, it has the obligation to conduct an investigation and reach a finding. If there is a finding of a violation, HHS must endeavor to obtain compliance. If compliance cannot be obtained, HHS may then refer the case to DOJ for consideration for litigation. Therefore, DOJ cannot initiate litigation against a state for alleged violations of Title II's integration mandate without a referral from HHS. To date, HHS has made no such referrals. DOJ is free, however, to file briefs as amicus curiae in suits brought by private litigants regarding this issue.

The Department's ability to enforce ADA integration regulation under CRIPA is statutorily limited to public residential institutions where the violation constitutes a pattern or practice among individuals who are current (or, in some cases, former) residents of the facility. Despite the limitation on its authority, DOJ declares that, since 1994, SLS has included ADA integration regulation in every CRIPA investigation involving nursing homes, psychiatric hospitals, and mental retardation facilities, and that SLS currently is investigating or negotiating settlements to remedy violations of ADA integration regulation and unconstitutional discharge planning and habilitation and treatment in 17 nursing homes, mental retardation facilities, and psychiatric hospitals in 12 states. The section currently is monitoring comprehensive settlements and court orders to remedy these issues in 30 such facilities in 11 states and the Commonwealth of Puerto Rico. The section also filed a CRIPA complaint and is litigating these ADA and constitutional issues in Johnson and *United States v. Murphy*,[81] a case involving G. Pierce Wood Memorial Hospital and community services in a five-district region in Florida surrounding this psychiatric hospital. DOJ states that these CRIPA investigations and cases involve thousands of persons with disabilities.

Sometimes allegations of inadequate performance regarding persons in residential treatment institutions have involved both DRS and SLS; one advocate described a case in which SLS determined that a facility was violating ADA, but DRS refused to pursue the matter because it claimed that it did not have sufficient resources to pursue such a case. Despite the accomplishments that DOJ points to, the National Council on Disability considers unnecessary and overly restrictive confinement in treatment and habilitation programs, residential institutions, and other types of service facilities to be one of the most serious and harmful problems faced by people with disabilities and does not believe that DOJ has done enough to address this problem.

It is hoped that the Supreme Court's recognition in *Olmstead v. L.C.*[82] that Title II of ADA requires states to provide habilitation and treatment services in the "most integrated setting appropriate" will spur both SLS and DRS to take more vigorous action to protect the rights of institution residents and to promote their placement in appropriate noninstitutional settings in their local communities. However, DOJ needs additional resources to expand its efforts in this area, and Congress should increase the Department's funding to conduct CRIPA investigations of facilities for persons with disabilities and to ensure compliance with Title II of ADA, particularly the integration requirement.

Some disability rights advocates were very critical of some of the positions taken by members of the office of the solicitor general (SG) in oral arguments on ADA cases before the Supreme Court during 1999. In particular, these advocates pointed to the acceptance by the SG attorneys of the EEOC's "class of jobs or a range of jobs" analytical gloss under the "regarded as" prong of ADA definition of disability during oral arguments in *Sutton v. United Airlines*[83] and *Murphy v. United Parcel Service*;[84] the egregious and pivotal failure to explain to the Court in the *Sutton* arguments that the "43 million" figure in ADA clearly referred to people with *actual* substantially limiting physical or mental impairments and not to people protected under the "record of" or "regarded as" prongs of the definition;[85] the importation, during oral arguments and briefing in *Olmstead v. L.C.*,[86] of a financial hardship defense—described as "significant expense"—to states' duties under Title II of ADA to render services in the most integrated setting appropriate;[87] and the suggestion to the Court during oral arguments in *Olmstead* that if there is disagreement about the need to institutionalize a particular person, the courts should defer to the state's treatment professionals—the institution's medical and other treatment staff.[88] Regarding the latter criticism, in an official response to a review draft of this report, DOJ observed that the solicitor general advised only deference to reasonable judgments made by the state's treatment professionals, quoting language in the *Arline* case, and that the solicitor general's brief clarified further that such professional judgments should be those that are not affected by extraneous considerations such as administrative convenience and costs.[89] In the view of the National Council on Disability, this contention does not adequately respond to the central point of the criticism, which is that institutional employees should be considered biased or at the very least to deserve no deference superior to that afforded other professionals. In any event, these performances by persons in the solicitor general's office, representing the United States before the High Court, demonstrate the danger of advocates unfamiliar with the details and nuances of disability rights law trying to master this relatively complex and sophisticated field of law on a "crash course" basis.

Apart from the examples cited, the Council has found few DOJ substantive policy positions with which the disability community takes issue. While some of the examples noted are significant, they are relatively few in number and hardly comparable with the number and substance of matters on which DOJ has taken positions that the Council believes to be correct. This is not to say, however, that DOJ gets glowing marks from the disability community for its ADA policy-setting efforts or that it has not been criticized, scathingly at times.

The most cogent criticisms of the Department, Division, and section, however, are not about what they have done but rather about what they have not done, or have not done on a timely basis, or not done with sufficient vigor and leadership. In other words, critics generally accuse DOJ not of misfeasance or malfeasance but of nonfeasance. Thus, DOJ is said to litigate far too few ADA cases and to take to court only cases in which the Department's position is easily defensible, the issues are not too complex, the defendants are not formidable or influential, and pursuing the case is not likely to generate negative media reaction.

In an official response to a review draft of this report, DOJ disagreed with the characterization that it takes to court only cases in which the issues are not too complex and provided an extensive "sampling" of ADA cases in which it has been involved, addressing various types of issues, including challenges to the constitutionality of Title II; coverage of persons who are HIV-positive; coverage of prisons; definition of disability issues, including whether an impairment substantially limits a major life activity and whether mitigating measures should be taken into account in determining disability; the impact of collective bargaining agreements on ADA arbitration rights; ramifications of disability benefits representations; a variety of other procedural and statutory coverage issues; insurance and pension issues; architectural standards issues; effective communication with 9-1-1 centers and in hospitals and doctors' offices; several state and local government services issues;

employment by state and local government agencies; transportation; refusals of medical care and other services for people who are HIV-positive; and accommodations in testing for persons with physical disabilities. Similarly, in response to the criticism that it takes to court only cases in which the defendants are not formidable or influential, DOJ provided a list of some states, state agencies, cities, and large business and association entities it had brought suit against under ADA.

The National Council on Disability certainly does not suggest that DOJ has never gotten involved in any ADA cases in which issues were complex nor that it has not brought suit against any formidable or influential interests. The NCD believes that DOJ litigation activities have become more extensive and ambitious as time has gone on; DOJ's case list is becoming increasingly impressive. The NCD notes, however, that much of the litigation cited by the DOJ as examples of the Department's involvement in complex issues were instances of the intervention or amicus participation of DOJ—sometimes at a relatively late stage—often in the appellate stage in cases brought by private parties. The Council also notes that some of the information it relied upon in support of such criticisms was derived from the comments of attorneys at DRS, who indicated that cases they believed DOJ should have litigated were turned down by the agency because the issues were too complex, the defendants were too formidable or influential, or pursuing the case was deemed likely to generate negative media reaction. And, irrespective of the exact dimensions of such problems, it seems clear that the Department of Justice could do more, particularly if provided adequate resources, to occupy a leadership role in litigating some of the thorny and frontier issues that arise or might be developed under ADA.

Some in the disability community further deride DOJ for intervening in too many cases instead of initiating them and of participating too frequently as amicus curiae instead of as a party. Regarding the latter issue, some D.C.-area disability rights activists were particularly incensed that DOJ opted to participate only as amicus curiae and belatedly in the case of *Paralyzed Veterans of America v. D.C. Arena,*[90] centering on the interpretation and application of "the lines of sight comparable" language in DOJ's ADA Title III standards, despite the repeated requests of the district court judge that DOJ intervene as a party, leaving the judge, in the words of the court of appeals, "exasperated."[91]

Some other advocates defended DOJ's decision not to intervene as a party, contending that the factual situation and posture of the case were not advantageous; that, as the representative of the United States, DOJ must be very selective about cases in which it becomes a party; and that, given limited resources, DOJ's frequent use of the amicus role is prudent. In an official response to a review draft of this report, DOJ points out, with justification, that DRS has been criticized by some in the disability community for undertaking too many cases involving stadiums. Furthermore, in DOJ's view, the Paralyzed Veterans of America (PVA) was represented by very competent counsel and did not appear to need DOJs intervention.

The National Council on Disability believes that DOJ's response to the criticism regarding the PVA case has merit, but urges DOJ to prepare to take a greater leadership role on cutting-edge and thorny issues in the future.

In the public policy arena, DOJ again has been criticized for taking on belatedly, or not at all, various important policy issues. For example, DOJ has not recently addressed the extent to which entities engaged in Internet commerce are covered by ADA requirements. DOJ did indicate, in a September 9, 1996, letter to Senator Tom Harkin, that covered entities are required to ensure effective communication with individuals with disabilities, including those with visual impairments, including Internet communications.[92]

The World Wide Web Consortium has developed Web Accessibility Guidelines that can guide entities in determining whether their Web sites are accessible. The composition and activities of the consortium are described in Chapter 6, section 6.5. In several discussions, DRS staff members interviewed indicated that DOJ was moving toward further elaboration on Web site accessibility in light of the unforeseeable increase in the volume and variety of uses of the Internet, but it was moving slowly because it believes the issues are complicated. Related to but not part of its ADA enforcement responsibilities, DOJ has taken some action to require accessibility to people with disabilities of federal agencies' electronic and information technology under Section 508 of the Rehabilitation Act of 1973, as amended by the Workforce Investment Act of 1998; as part of its mandate under Section 508, the Department has created a Section 508 Home Page,[93] notified the heads of all federal agencies of their obligations under Section 508, instructed them to conduct and submit self-evaluations of their electronic and information technology, and collected and analyzed voluminous data. This executive-branch-wide self-evaluation of the accessibility of information technology culminated in the release on April 18, 2000, of the Department's report, "Information Technology and People with Disabilities: The Current State of Federal Accessibility," a report from the attorney general to the president.

DOJ has not established policies that would clearly require entities covered by Titles II and III to procure equipment and technology with accessibility features, which, in turn, would prompt more manufacturers to produce and market such features. Gas pumps and ATMs are two examples. Gas stations and banks have argued that they are constrained, in part, by what manufacturers produce. DRS has observed that, under ADA, DOJ has no direct relationship to manufacturers of technology and cannot set specific manufacturing standards. What the Department can do, however, is establish a clear and enforceable policy that requires gas stations and banks to install accessible technology within different reach ranges.[94]

In an official response to a review draft of this report, DOJ contends that the criticism regarding ATMs and gas pumps is not well-founded. The Department argues that the definition of the term "facility" includes "equipment"[95] and that the need to make facilities accessible appears throughout the Title III regulation. In fact, DOJ specifically deleted a provision from the proposed rule that would have required accessible equipment, on the grounds that "its requirements are more properly addressed under other sections . . . ".[96] The preamble to the Title III regulation goes on to observe that some types of equipment, expressly including "automated teller machines" are required to meet the requirements of certain specific provisions in ADA Accessibility Guidelines.[97] These requirements would apply to ATMs with regard to new construction and alterations and to barrier removal if readily achievable. Regarding gas pumps, DOJ admits that it has not established specific design requirements for equipment not addressed in ADA standards (e.g., gas pumps) but contends that facilities (including equipment) for which ADA standards do not establish specific scoping requirements must, nevertheless comply with requirements, such as the reach ranges, that are applicable to all accessible elements.

Despite DOJ's responses, the National Council stands by its conclusion that the Department has not established policies that would *clearly* require entities covered by Titles II and III to procure equipment and technology with accessibility features, which, in turn, would prompt more manufacturers to produce and market such features. DOJ's reasoning regarding ATMs under Title III, while legally convincing, requires a chain of reasoning that is not obvious nor likely to be grasped by bank personnel or necessarily even by their attorneys if they simply look through the Title III regulation for guidance regarding ATM accessibility. It also links ATMs to an analysis of facilities and construction or alteration rather than to the availability of the service that is supposed to be provided to customers at these machines. Moreover, DOJ's reasoning regarding ATMs completely ignores such types of equipment (and ATMs and gas pumps were intended only as examples) provided by state and local government entities and covered by Title II. As to gas pumps, the regulation provides no guidance at all, and the best DOJ can do is point to is a statement in its Title III Technical Assistance Manual that addresses types of facilities for which "ADAAG has no standards" and advise that in such cases "ADAAG standards should be applied to the extent possible." This is hardly a clear statement about gas pumps and similar equipment. This deficiency is brought home on DOJ's ADA Web site page discussing self-serve gas stations (http://www.usdoj.gov/crt/ada/gasserve.htm), where the Department describes the steps gas stations are required to take to provide access in terms of providing refueling assistance to those unable to use the pumps, posting signs that refueling assistance is available, and providing refueling assistance without extra charge, while not mentioning any obligation for the station to procure accessible equipment.

Although it has addressed the issue in litigation,[98] DOJ has not issued a separate policy guidance document on the accessibility problems created by stadium-style seating in theaters, a type of seating that has become increasingly popular in newly constructed theaters. If such theaters are not constructed correctly, serious accessibility problems are posed for movie patrons who use wheelchairs or have other mobility limitations. In DOJ's view, existing standards and policy positions provide clear guidance that such seating must incorporate accessibility features, and DOJ believed it necessary to address this issue quickly through litigation because of the pending construction of a number of facilities incorporating such seating that would have ignored the accessibility requirements. The revised ADAAG developed by the Access Board will address stadium-style seating and when adopted by DOJ will underscore DOJ's current position regarding the necessity of accessibility features; before or after the adoption of a revised ADAAG by DOJ, the Department's position is that theaters incorporating such seating must comply with accessibility requirements and should not risk postconstruction complaints and litigation and expensive retrofitting. DOJ should publicize the manner in which these theaters should and can be constructed in accordance with ADA.

With regard to some issues that DOJ has addressed, some advocates contend that it has done so only partially or tardily. DOJ has addressed issues involving insurance at the appellate level. DOJ let the EEOC take the lead on long-term disability insurance coverage because it is a Title I issue. DOJ has since gotten involved because it became a Title III issue when courts decided that a person who is no longer working does not have standing under Title I.[99] DOJ has lost one case on this issue in the Third Circuit (ruling that terms and conditions of insurance policies are not covered under Title III) and has one pending in the Second Circuit. DOJ attorneys think that this issue will be going to the Supreme Court. Persons outside DOJ felt that DOJ has not done enough or given this issue as much priority as it merits. Insurance companies rely on their actuarial data, although plaintiffs usually do not have access to those data or the decision rules associated with them. DOJ could play a useful role in the insurance area by taking on cases that challenge the actuarial data and by commissioning studies about the state-of-the-art of actuarial standards. It is difficult for a private plaintiff to marshal the resources for an insurance case; DOJ is more able to support such a suit.

In an official response to a review draft of this report, DOJ strongly took issue with the view that it has not done enough in litigating insurance issues. In its view, DRS has opened a number of investigations of insurance issues, and, although most of them have settled, the section has declared that it would litigate any insurance case that failed to settle. In addition, DOJ indicates that it has litigated, both at the district court and the appellate court level, the fundamental issue of whether Title III covers insurance, and notes that it has filed seven amicus briefs at the appellate court level on this critical question. DOJ asserts that a serious question remains as to whether the courts will continue to recognize a cause of action under Title III for discrimination in the terms and conditions of insurance. In fact, in the Department's view, it was private attorneys' inability to recognize the risk inherent in bringing those cases involving mental/physical distinctions in long-term disability policies that led directly to the current situation. DRS believes that marshaling its resources to protect Title III insurance coverage was and continues to be of paramount importance. In the view of the National Council on Disability, DOJ's concerns about the performance of the private bar on this issue underscores the need for DOJ to have gotten "out in front" in the litigation, before the law took a turn for the worse. Moreover, the course of development of legal precedents might have been affected positively if the Department had taken stances on critical insurance issues in regulations or subregulatory guidance. Among these, DOJ's arguments about Title III coverage of insurance might have been enhanced if it had taken a timely position in regulations or guidance to limit Title V's "safe harbor" provision regarding insurance, for example, by providing that disadvantageous treatment in coverage or terms of insurance on the basis of physical or mental impairment without actuarial justification is discrimination under ADA.

DOJ has yet to issue policy guidance in relation to the implications of the *Olmstead* case. Among the most complex and volatile of the emerging issues is the continued institutionalization of people with disabilities in state hospitals, nursing homes, and other restrictive, segregated facilities in violation of ADA principle establishing their right to receive services in the most integrated setting appropriate to meet their needs. The disability community, long concerned with the impact of the nation's legacy of institutionalization, has identified this issue as one of its highest policy priorities.

At the heart of this issue are conflicting public policy goals. The integration mandate of ADA is operating at cross-purposes with entrenched, federal health care policies and programs that support segregated institutions. Proponents of such institutions assert that it is too costly to deliver services in integrated settings such as people's homes. Adding to the cost concerns is the "false assumption that people with disabilities must be segregated from the rest of society in institutions."[100] ADAPT, a national grassroots disability rights organization dedicated to challenging the continued existence of segregated residential institutions, has made a strong case that the political strength of the nursing home lobby has played a major role in the continuation of these public policies. "Out of sight, out of mind" remains the national health care policy solution for many people with disabilities. In the absence of health care system reform that includes a commitment to integrated services and programs, people with disabilities are turning to the courts for solutions. At this critical time, it is vitally important that DOJ provide leadership in enforcing the integration mandate of ADA.

ADAPT has actively pressured DOJ and the Department of Health and Human Services to articulate their positions about whether such segregated facilities violate ADA. ADAPT asked both agencies to respond to its assertion that states were violating ADA if their self-evaluations did not identify the extent to which programs failed to provide programs and services in the most integrated setting appropriate to the needs of the individual. DOJ responded by stating, "If a state has failed to address ADA's integration requirement in its self-evaluation, then its self-evaluation is incomplete."[101] While DOJ states that Title II permits separate programs in a few, limited circumstances, it also recognizes that the practice of segregation in state institutions is a violation of the law.[102]

As noted earlier, DOJ can only become involved in litigation against a Title II entity such as a state institution or nursing home if the case is formally referred by one of ADA federal referral agencies. Interviews with DRS staff members revealed frustration with this process because, they said, the agencies do not refer many cases. Also, once a case is referred, DOJ must strive to work cooperatively with the referring agency, even if they disagree on legal strategies or interpretations.

While these technical and legal roadblocks are legitimate, DOJ's overall ADA enforcement role vests the agency with enough authority to justify taking a proactive policy stance on this cutting-edge issue. Thus far, DOJ has not issued a policy statement distinguishing between permissible segregated programs that people with disabilities can elect to participate in and the unlawful operation of segregated institutions without choices of integrated community settings (e.g., remaining in their homes) for people with disabilities who prefer them. DOJ acknowledged to ADAPT that states are out of compliance with Title II's self-evaluation requirement if they fail to address the integration requirement, but DOJ's response did not suggest that the agency plans to take any action against states that have acted unlawfully in this way. DOJ has elected to present its policy views on this subject only in its legal briefs supporting integration in private cases in which DOJ intervenes, which sends a strong message to states that DOJ will not challenge their illegal practices until a private citizen brings a lawsuit. This is a crucial policy area that cries out for federal leadership, particularly to build upon the *Olmstead* decision of the Supreme Court, but DOJ is not providing it.

In an official response to a review draft of this report, DOJ denied that it has failed to provide leadership in implementing the *Olmstead* decision. It indicated that it has worked closely with HHS in developing post-*Olmstead* policy guidance. According to DOJ, HHS has appropriately taken the lead role in issuing guidance to state Medicaid directors because of its responsibility for administering the Medicaid program. The Department believes it has also demonstrated its leadership in its enforcement activities and denies that it has only spoken through amicus briefs. The Department asserts that it has also presented its views on *Olmstead* in cases initiated by the Special Litigation Section under the Civil Rights of Institutionalized Persons Act. It has not, however, taken the lead to influence the interpretation of the integration requirement under Title II by issuing a regulation or subregulatory guidance interpreting *Olmstead* in a helpful manner. It is the view of the National Council on Disability that DOJ should demonstrate the same kind of leadership and initiative with regard to this issue as the Department of Health and Human Services showed on January 14, 2000, when Secretary Donna Shalala issued a letter to the governor of each of the states, citing the *Olmstead* decision and the Department's belief "that no person should have to live in a nursing home or other institution if he or she can live in his or her community" and a letter from the Health Care Financing Administration to each state's, medicaid director, explaining the *Olmstead* ruling in more detail and indicating that each state should have "a comprehensive, effectively working plan for placing qualified persons with disabilities in the most integrated setting appropriate."

Overall, a significant problem is that DOJ has simply not issued much policy guidance of any kind. Since the issuance of its Title II and Title III regulations, and with the exception of its technical assistance manuals (which, while not formally binding, are persuasive authority regarding an agency-intended interpretation of a law), DOJ has published relatively little in the way of technical assistance documents and has issued next to nothing in the way of formal policy guidance. DOJ explains that it views the policy positions it takes in its briefs and other litigation documents as constituting policy guidance documents. These are, however, certainly no substitute for more easily available, more easily understood, and more clearly binding policy guidance documents issued and disseminated as such.

2.10.1 Findings and Recommendations

Finding 14: DOJ has taken strong and appropriate policy positions on various issues in cases it has litigated.

Examples include

- Interpreting Title II broadly to cover all activities of state and local governments, such as prisons, arrest procedures, animal quarantine programs, zoning practices, and residential treatment and nursing facilities.

- Arguing that compensatory damages are available for violations of Title II.
- Advocating broad and inclusive interpretation of Title III coverage of public accommodations, to include, for example, the NCAA, PGA events, terms of insurance policies, cruise vessels (even those registered in a foreign country), and rental cars and shuttle bus services provided by rental car businesses.
- Defending the constitutionality of ADA as appropriate legislation under both the Fourteenth Amendment and the Commerce Clause of the Constitution.
- Challenging unnecessary inquiries by licensing authorities into an applicant's or licensee's disability in the context of professional licenses, including law and medical.
- Interpreting the requirement of making reasonable modifications in policies, practices, and procedures of both state and local governments and places of public accommodations broadly to apply in a wide variety of settings, including the use of driver's licenses for identification purposes, the LSAT, and child care centers.
- Taking a clear and consistent stance that privately owned businesses that serve the public, such as restaurants, hotels, retail stores, taxicabs, theaters, concert halls, and sports facilities, and all state and local government agencies must allow people with disabilities to bring their service animals onto business and government premises in customer and public areas and cannot impose a deposit or surcharge as a condition to admitting a service animal.
- Contending that persons with asymptomatic HIV disease are persons with disabilities under ADA and that treating a patient with HIV disease in the dental setting does not pose a direct threat to the health and safety of others.
- Requiring state and local governments to ensure effective communication with people with disabilities in various public services, including emergency 9-1-1 services, court proceedings, interactions with the police, in jail and prison settings, local governmental proceedings, and government training programs.
- Requiring places of public accommodation to provide appropriate auxiliary aids for people with communication-related disabilities in a variety of contexts, including health care, licensing examinations and preparation for such examinations, and recreation venues.
- Contending that the Title III new construction accessibility requirement covers architects, contractors, and franchisors.

Finding 15: DOJ has made almost no use of its authority to issue additional regulations and subregulatory guidance under ADA.

Unlike the EEOC, which has shown that subregulatory guidance can be used very effectively to promote the implementation of ADA Title I requirements, DOJ has almost totally ignored this implementation tool. In addition, DOJ should be willing to issue additional regulations as necessary to fill gaps in the original regulations or to refine legal standards to reflect new developments and problems experienced with prior standards.

Recommendation 15: DOJ should regularly issue subregulatory guidances and, as necessary, additional regulations to promote its policy stances, facilitate compliance, and guide the courts and other federal agencies. Among other matters, DOJ should

- Underscore the application of Titles II and III of ADA to Web sites engaged in commerce, as part of its policy-making and enforcement responsibilities.
- Issue policy guidance to clarify that information kiosks and other information transfer technologies must be accessible to people with disabilities, including people with visual impairments.
- Issue policy guidance to require clearly that entities covered by Titles II and III must procure equipment and technology with accessibility features, including specifically ATMs and gas pumps.

Recommendation 16: DOJ/DRS should engage in strategic planning and evaluation, including consultation with the disability community, as the basis for developing a focused strategy for maximizing its impact on Title II and III enforcement.

The need for targeting enforcement efforts to identified priorities and a cohesive strategy plan is particularly critical in light of DOJ's limited financial and personnel resources for ADA enforcement. In an official response to a review draft of this report, DOJ indicated that it does engage in strategic planning has consulted with the disability community in developing its strategic plan, and intends to continue these activities. The researchers and the National Council on Disability, however, are unaware of any formal document presenting a strategic plan for the Department's ADA enforcement activities. DOJ also noted that an ongoing, formal mechanism for providing policy advice would be subject to the requirements of the Federal Advisory Committee Act (FACA). The National Council on Disability recommends that DOJ arrange for appropriate input from the disability community, through less formal means as contemplated with regard to Recommendations 6 and 13 of this chapter, or, if necessary, through a formal advisory mechanism subject to FACA.

Recommendation 17: DOJ should take a proactive leadership role with regard to implementing ADA requirement, recognized in the *Olmstead* decision, that treatment, training, habilitation, and other services provided for people with disabilities must be in the most integrated setting appropriate; in pursuit of this goal, DOJ should

- Issue a subregulatory guidance interpreting the implications of the *Olmstead* ruling as requiring integrated settings in lieu of segregated institutions and nursing homes.
- Prepare and implement a strategic plan for challenging states' violation of ADA's mandate to provide services in the most integrated settings appropriate to the needs of persons with disabilities, including the pursuit of litigation against noncomplying facilities.
- Coordinate with and provide leadership to the Department of Health and Human Services and other federal agencies to ensure a unified federal policy requiring services to be provided in appropriate, integrated settings, and to obtain referrals to DOJ from other federal agencies of cases suitable for litigation.

In an official response to a review draft of this report, DOJ indicated that the Special Litigation Section has taken and will continue to take the steps outlined in Recommendation 17. The National Council on Disability does not believe that DOJ/SLS has issued subregulatory guidance of the type described in the recommendation, is not aware of any document reflecting the strategic plan of the type described in the recommendation, and does not believe the Department has occupied a sufficiently proactive leadership role on these issues.

Recommendation 18: The seven other designated agencies (the Department of Agriculture, the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development, the Department of the Interior, the Department of Labor, and the Department of Transportation) should refer to the Department of Justice Title II cases suitable for litigation.

All of the designated agencies should make it a priority to refer appropriate Title II cases for litigation. The Department of Health and Human Services should make a particular effort to refer cases that involve enforcement of the integration requirement of Title II in its application to residential or treatment facilities for persons with disabilities.

Recommendation 19: DOJ should take a more proactive leadership role with regard to the application of ADA to discrimination in insurance; in pursuit of this goal, DOJ should

- Issue a regulation or subregulatory guidance making it clear that unequal classification or treatment of individuals with disabilities with regard to insurance eligibility, premiums, or benefits not based upon bona fide actuarial data violates ADA.
- Establish and fund a project to conduct research regarding insurance and actuarial procedures to identify what actuarial data and medical standards insurance companies assert to justify differential treatment of individuals with various disabilities; to assess how accurate, timely, and relevant the asserted justifying data are; and to develop independent data and information, available to the public, to serve as a comparative yardstick.
- DOJ should initiate and intervene in more lawsuits challenging companies' use of actuarial data as in violation of ADA.

2.11 Relationship Between Performance and Resources

Various sections of this chapter identify areas in which DOJ performance in enforcing ADA has fallen short of expectations. Where the NCD believes that improvements are warranted, it has presented its recommendations for specific changes and reforms. This section addresses a more generic and elemental issue: the extent to which DOJ shortcomings are influenced by a shortage of resources.

2.11.1 Resources and Enforcement Limitations

As noted in section 2.1.3 above, among the areas in which DOJ enforcement has been deficient or less than optimal, many, although certainly not all, are related in some degree to limitations in DOJ's fiscal and personnel resources for ADA activities. The following weaknesses or subjects of criticism in DOJ performance, identified in previous sections of this report, are linked to some extent to limited resources:

- Only small numbers of Title III cases are opened. The do-not-open letter informs complainants that DRS will not be investigating the complaint due to restricted resources.
- Limited resources appear to be a factor in the sending of some Title II cases directly to mediation without investigation.
- DOJ has filed too few court cases and has not intervened in enough cases. Critics say DOJ takes only the easy cases, not difficult or complex ones. Another criticism is that DOJ tends to focus on "big issue" cases rather than the more numerous complaints against neighborhood businesses that affect individuals with disabilities in their daily lives.
- Insufficient resources place an inordinate pressure on DOJ to settle cases, as settlement avoids the time, expense, and use of resources required in going to court.
- Resources available for cases is a factor that influences the Appellate Section's decisions not to pursue some cases on appeal or not to file an amicus brief.
- DOJ lacks adequate funding to enforce CRIPA more vigorously.
- DOJ allegedly refused to sue a state residential facility because DRS believed it did not have sufficient resources to pursue the case.
- DOJ has issued too few guidance documents.
- Because of insufficient resources and personnel, DOJ's hotline does not permit callers to leave a message and receive a call back, and the hotline is only operational during limited hours.
- DOJ does not adequately track Title II complaints it refers to designated federal agencies, nor does it routinely obtain information about other agencies' ADA complaints.
- DOJ does not monitor results of mediations.
- DOJ has been inordinately slow in issuing some standards based upon guidelines issued by the Architectural and Transportation Barriers Compliance Board, including those related to children's facilities and facilities of state and local governments.

- DOJ has often done a poor job of sending timely correspondence to keep complainants informed of the handling of their complaints.
- Data in DOJ's complaint data management system for ADA have gaps and other deficiencies.

While some of these issues are affected by structural, attitudinal, and administrative factors, limitations on resources play a significant role in each.

2.11.2 Findings and Recommendations

Finding 16: A shortage of fiscal and personnel resources has played a role in many of the shortcomings of DOJ ADA enforcement.

The resource limitations factor should not be overplayed. Fiscal and personnel limits are certainly not the sole problem. Critics complain that DOJ has not done enough despite the consistent growth of DRS funding for ADA enforcement, which nearly doubled from $2.2 million in 1991 to $4.6 million in 1992, nearly doubling again in 1993 to $8 million, and continuing to grow to $10.8 million in FY 1999. Nonetheless, the enforcement of ADA, the most comprehensive of any civil rights law, is a hugely important and incredibly resource-intensive endeavor and cannot be accomplished without an adequate infusion of resources, considerably beyond what has been provided to date. In some issue areas, for example, enforcement of the Title II integration mandate as it applies to public facilities for persons with disabilities, the impact of resource restrictions is direct, obvious, and highly detrimental.

Recommendation 20: Congress should approve President Clinton's request for an approximately 20 percent increase in the annual budget of the Civil Rights Division, and DOJ should apply this increase proportionately to increase resources devoted to ADA enforcement. With these additional funds, DRS should enhance its performance and intensify its efforts with regard to enforcement areas in which it has fallen short because of resource limitations.

President Clinton proposed the increased civil rights funding during a speech on Martin Luther King, Jr.'s birthday on January 15, 2000, and referred to it again during his State of the Union message on January 27, 2000. The administration's actual budget request as part of its proposed Fiscal Year 2001 budget calls for an additional $16 million for the Civil Rights Division, a 19 percent increase over last year's budget of $82.2 million. Of this, the budget calls for an increase of $2.4 million to support ADA enforcement activities. The receipt of such funding should enable DRS to accomplish most of the objectives whose nonachievement it attributes to insufficient resources.[103] DRS reports that this budget would provide a 35 percent increase in ADA enforcement personnel, representing 29 new positions. The expenditure of increased funding should be guided by the recommendations presented in this report.

Endnotes

1.U.S. Department of Justice, Disability Rights Section, *Responses from the Disability Rights Section* (to questions from the U.S. Commission on Civil Rights), n.d., 1998.

2.56 Fed. Reg. 35,716 (1991), codified at 28 C.F.R. pt. 35 (Title II); 56 Fed. Reg. 35,544 (1991), codified at 28 C.F.R. pt. 36 (Title III).

3.56 Fed. Reg. 35,544, 35,605-35,691 (1991), codified at 28 C.F.R. pt. 36, app. A ("Standards for Accessible Design").

4.The EEOC determined that it will not have to review its Title I regulations because the requirements of Title I do not meet the standard of significant economic impact (communication from K. Courtney, EEOC, 4/1/99).

5.Additional discussion of this can be found in U.S. Commission on Civil Rights, *Helping State and Local Governments Comply with ADA*, September, 1998, p.

6.Found at http://www.usdoj.gov/crt/foia/records.htm.

7.Found at http://www.usdoj.gov/crt/foia/talindex.htm.

8.Found at http://www.usdoj.gov/crt/foia/cltindex.htm.

9.Found at http://www.usdoj.gov/crt/foia/lofindx.htm.

10.Found at http://www.usdoj.gov/crt/foia/settlement.htm (Settlement Agreements and other Court Documents, by state) and http://www.usdoj.gov/crt/foia/adaalph.htm (Alphabetic List of Settlement Agreements).

11.29 U.S.C. § 794

12.28 C.F.R. Part 35, Subpart G, Section 35.190.

13.U.S. Department of Justice, *How to File a Title III Complaint*, at www.usdoj.gov/crt/ada/t3compfm.htm.

14.28 C.F.R. Part 35, Section 36.506.

15.Interview with S. Conway, January 7, 1999.

16.There are few or no mediators in Wyoming, Montana, upstate New York, western Texas, and north Florida. Interview with S. Conway, January 7, 1999.

17.Interview with S. Conway, January 7, 1999.

18.U.S. Department of Justice, Disability Rights Section, *Responses from the Disability Rights Section* (to questions from the U.S. Commission on Civil Rights), n.d., 1998

19.Interview with J. Wodatch, January 20, 1999.

20.This was also noted and criticized in the Civil Rights Commission report, U.S. Commission on Civil Rights, *Helping State and Local Governments Comply with ADA*, September, 1998, p. 31.

21.The database designation of two "issues" is somewhat misleading. The categories that comprise issue 1 are generally types of settings or covered entities: commerce, courts, courthouses, testing, fire and rescue, government office, law enforcement, parole/probation, corrections (institutional and community-based), public building, voting, and laws and policies. Issue 2 categories are types of problems or discrimination issue areas: auxiliary aids (general category), auxiliary aids—assistive listening devices, auxiliary aids—alternate format materials, auxiliary aids—interpreters, auxiliary aids—TDDs, auxiliary aids—readers/amanuenses, employment, environmental illnesses, AIDS/HIV, inaccessibility, insurance, jury service, new construction, retaliation, self evaluations/transition plans, service delivery, and zoning. The categories included in each "issue" designation are not necessarily distinct, of the same type, or mutually exclusive. The database includes some items with entries under both issue 1 and issue 2, under one but not both, or under neither. The database does not contain a column for an issue 3, 4, etc., but some items had more than one entry in one of the issue 1 or 2 columns.

22.U.S. Department of Health and Human Services, *FY 1997 and FY 1998 (Through April 30, 1998) Disability Complaints*, Office of Civil Rights.

23.Statement of Omar Guerrero, Office of Civil Rights, DHHS, at meeting of National Council on Disability, Washington, D.C., June, 1997.

24.42 U.S.C. § 12188(b)(1)(B).

25.42 U.S.C. § 12188(b)(1)(A)(i).

26.42 U.S.C. § 12212.

27.42 U.S.C. § 12188(b)(1)(A)(i).

28.Interview with J. Blizard, January 7, 1999.

29.Pursuant to a settlement agreement entered into by DOJ and Lone Star on Feb. 28, 1995, Lone Star agreed to remodel 97 of its 105 restaurants to bring them into compliance with ADA accessibility requirements.

30.Pursuant to a settlement agreement entered into by DOJ and Angelo Community Hospital on Aug. 11, 1995, the hospital agreed to revise its alteration plans for the hospital to make them conform with ADA accessibility guidelines.

31.*Blacks Law Dictionary*, 210 (6th ed. 1991).

32.*Blacks Law Dictionary*, 210 (6th ed. 1991).

33.Executive Order 12988—Civil Justice Reform, February 6, 1996.

34.Andrew I. Batavia, "Inclusion in Public Accommodations," in J.E. West (ed.), *Implementing the Americans with Disabilities Act*, Cambridge, MA: Blackwell Publishers and Milbank Memorial Fund (co-publisher), 1996, p. 272.

35.Other priorities that do not involve litigation topic priorities were also identified. These include mediation, amicus participation, continuation and increase in the involvement of Assistant U.S. attorneys, revision of the accessibility standards, and access to technology.

36.Researchers were told of a few earlier settlement agreements that purportedly involved the Department's settling for measures that were not as extensive as ADA requires. One example cited was an agreement that allowed someone to be carried into a building provisionally for a number of months, until accessibility alterations were completed, although DOJ's position is that carrying is not an acceptable means for achieving accessibility. Another was an agreement involving a local courthouse in which court authorities were required to reassign cases to an accessible facility on 10 day's notice, a solution of questionable feasibility as many types of criminal proceedings arise on short notice, not permitting 10 day's notice.

37.The distribution of call topics and issues is taken from the minutes of the meeting of the Interagency Subcommittee on Disability Statistics, January 13, 1999, where Ruth Lusher of DRS made a presentation; the figures are rounded to the nearest one-half percent.

38.524 U.S. 206 (1998).

39.152 F. 3d 907 (8th Cir. 1998).

40.81 F.3d 1480 (9th Cir. 1996).

41.117 F. 3d 37 (2d Cir. 1997).

42.See, e.g., Tyler v. City of Manhattan, Kansas, 118 F.3d 1400 (10th Cir. 1997), in which DOJ filed an amicus brief arguing that Title II authorizes awards of compensatory damages regardless of whether the discrimination is intentional. The brief also argued that the plaintiff is entitled to a jury trial when seeking such damages. The district court had found that Manhattan violated Title II of ADA by holding town meetings and baseball games, which the plaintiff was interested in attending, in inaccessible areas and by failing to create an adequate self-evaluation plan. However, the district court decided that damages were not available under Title II in the absence of intentional discrimination and that the plaintiff was not entitled to a jury trial under Title II. The Tenth Circuit decided not to rule on the damages issue because it was not properly presented to the court by the plaintiffs.

In Ferguson v. City of Phoenix, 157 F.3d 668 (9th Cir. 1998), the U.S. Court of Appeals for the Ninth Circuit decided that plaintiffs must prove intentional discrimination to recover compensatory damages under Title II. The lawsuit was brought by TDD users who were unable to communicate by TDD with the Phoenix 9-1-1 emergency service, because the city's system was not properly designed to recognize TDD calls. The district court entered a consent order mandating changes in Phoenix's 9-1-1 system to ensure direct access to TDD users. The court, however, held that plaintiffs could not obtain compensatory damages under Title II without showing that Phoenix acted with discriminatory intent. On appeal, the Ninth Circuit rejected the argument made by the Department of Justice in its amicus brief that no showing of intentional discrimination was required.

43.Butler v. National Collegiate Athletic Ass'n, 74 F.Supp.2d 1021 (W.D.Wash. 1999); Bowers v. National Collegiate Athletic Ass'n, 9 F.Supp.2d 460 (D.N.J. 1998); Tatum v. National Collegiate Athletic Ass'n, 992 F.Supp. 1114 (E.D.Mo. 1998).

44.Recent examples include World Ins. Co. v. Branch, 966 F.Supp. 1203 (N.D.Ga. 1997), aff'd in part, vacated in part, 156 F.3d 1142 (11th Cir. 1998), and Doe v. Mutual of Omaha Ins. Co., 999 F.Supp. 1188 (N.D.Ill. 1998), rev'd, 179 F.3d 557 (1999), cert. denied, 120 S.Ct. 845 (2000), which involve challenges to caps on lifetime benefits for AIDS-related conditions; Chabner v. United of Omaha Life Ins. Co., 994 F.Supp. 1185 (N.D.Cal. 1998), which involves a challenge to the imposition of an excessive fee to an individual with fascioscapulohumeral muscular dystrophy; and Wai v. Allstate Ins. Co., 75 F.Supp.2d 1 (D.D.C. 1999), which involved a challenge to an insurance company practice of requiring commercial insurance, rather than less expensive landlord property insurance, for a group home for persons with mental retardation.

45.Stevens v. Premier Cruise Lines, No. 98-5913 (11th Cir. 1999).

46.Settlement Agreement, DOJ Complaint Number 202-37-60 (May 27, 1999), found at http://www.usdoj.gov/crt/ada/avis99.htm.

47.See http://www.usdoj.gov/opa/pr/1996/March96/094.cr.

48.See http://www.usdoj.gov/opa/pr/Pre_96/January95/6.txt.html.

49.119 S. Ct. 2176 (1999).

50.46 F.3d 325 (3d Cir. 1995), cert. denied, 516 U.S. 813 (1995).

51.880 F. Supp. 430 (E.D. Va. 1995).

52.1994 WL 86068 (N.D.Ill. 1994).

53.No. 99-CV-6209 (E.D.Pa. 1999).

54.DOJ efforts helped produce (1) an agreement with Sunshine Child Center in Gillett, Wisconsin, in which the center agreed to provide diapering services to children who, because of their disabilities, require diapering more often or at a later age than nondisabled children; to put on and remove the complainant's leg braces as necessary; and to ensure that the complainant is not unnecessarily segregated from her age-appropriate classroom; (2) a 1996 settlement agreement with KinderCare Learning Centers—the largest chain of child care centers in the country—under which KinderCare agreed to provide appropriate care for children with diabetes, including providing finger-prick blood glucose tests; and (3) a 1997 agreement under which La Petite Academy—the second-largest chain—agreed to follow the same procedures agreed to by KinderCare and also agreed to keep epinephrine on hand to administer to children who have severe and possibly life-threatening allergy attacks due to exposure to certain foods or bee stings and to make changes to some of its programs so that children with cerebral palsy can participate.

55.55 F.Supp.2d 1048 (N.D.Cal. 1999).

56.At http://www.usdoj.gov/crt/ada/gasserve.htm.

57.At http://www.usdoj.gov/crt/ada/restripe.htm.

58.At http://www.usdoj.gov/crt/ada/stadium.txt.

59.At http://www.usdoj.gov/crt/ada/childq%26a.htm.

60.The case of U.S. v. Castle, Case No. 94-20393 (5th Cir. 1994) produced the first AIDS-related settlement with a dental service under ADA; a Houston dental office paid $100,000 in damages and penalties for refusing to treat a patient who revealed that he had HIV disease. Under the consent order, defendant Castle Dental Center, a large chain of dental offices in the Houston area, paid $80,000 in compensatory damages to that patient. In addition, the owner of the center and its management company each paid a $10,000 civil penalty to the Federal Government. The defendants also were required to provide full and equal services to persons with HIV or AIDS, and to train their staff in nondiscriminatory treatment of persons with HIV or AIDS.

In United States v. Morvant, 898 F. Supp. 1157 (E.D.La. 1995), DOJ prevailed in its challenge to the refusal of a New Orleans dentist to provide routine dental care to two individuals because of their HIV-positive status. In granting summary judgment to the Department, the U.S. District Court for the Eastern District of Louisiana held that (1) HIV-positive status and AIDS are protected disabilities under ADA; (2) the "referral" of an individual with HIV or AIDS to another dentist on the basis of the patient's HIV-positive status alone is discriminatory; (3) providing routine dental care to persons with HIV or AIDS does not pose a "direct threat" to the health or safety of others; and (4) ADA is constitutional as applied in that case. The court ordered Dr. Morvant to stop refusing to treat persons with HIV or AIDS. In a subsequent agreement Dr. Morvant agreed to pay compensatory damages of $150,000.

61.118 S.Ct. 2196 (1998).

62.The First Circuit found that the plaintiff had produced adequate evidence that individuals with HIV can be safely treated by a dentist as long as universal precautions are followed, and that the dentist had failed to introduce any evidence that treating the patient would pose a direct threat to the health or safety of the dentist or his staff. DOJ filed an amicus brief in the First Circuit in support of the patient.

63.ADA's abrogation of immunity has been upheld by the Second, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh circuits and district courts within those circuits. See, e.g., Muller v. Costello, 187 F.3d 298, 309-10 (2d Cir. 1999); Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 178 F.3d 212, 217 (4th Cir. 1999), reh'g en banc granted and opinion vacated, (Dec. 28, 1999); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir. 1998), cert. denied, 119 S. Ct. 58 (1998); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997); Dare v. State of Cal., No. 97-56065, 1999 WL 717724 (9th Cir. Sept. 16, 1999); Clark v. California, 123 F.3d 1267, 1270-71 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); Martin v. Kansas, 190 F.3d 1120)(10th Cir. 1999); Garrett v. University of Alabama at Birmingham Bd. of Trustees, 1999 WL 972170 (11th Cir. Oct. 26, 1999); Seaborn v. Florida, 143 F.3d 1405, 1406 (11th Cir. 1998), cert. denied, 119 S. Ct. 1038 (1999). Likewise, the abrogation of state sovereign immunity in Section 504 has been upheld by the Fourth, Seventh, Ninth, and Eleventh circuits. *Amos*, 178 F.3d 212; *Crawford*, 115 F.3d 481); *Dare*, 1999 WL 717724; *Clark*, 123 F.3d 1267; *Garrett*, 1999 WL 972170.

In contrast to most other jurisdictions, the Eighth Circuit found invalid the abrogations of immunity under all three of these laws and even held that Section 504's waiver of immunity was coercive. Bradley v. Arkansas Dep't of Education, 189 F.3d 745 (8th Cir. 1999), reh'g en banc granted and opinion vacated in part by Jim C. v. Arkansas Dept. of Educ., 197 F.3d 958 (8th Cir. 1999); Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (en banc), cert. granted, 68 U.S.L.W. 3164 (Jan. 25, 2000) (No. 99-423), cert. dismissed, 120 S.Ct. 1265 (Mar. 1, 2000). The Eighth Circuit, however, upheld IDEA's waiver of immunity, because IDEA's obligations attach only to IDEA-related funds not to all federal funding. *Bradley*, 189 F.3d 745. This Circuit recently vacated and will consider en banc the portion of the *Bradley* decision regarding the waiver provision under Section 504, although the remainder of *Bradley* remains intact.

64.See, Kimel v. Board of Regents, 139 F.3d 1426, 1433, 1442-43 (11th Cir. 1998), aff'd, 120 S.Ct. 631 (2000) (as to ADEA), cert. granted (as to ADA issue), 119 S.Ct. 901 (1999).

65.184 F.3d 999 (8th Cir. 1999) (en banc), cert. granted, 68 U.S.L.W. 3164 (Jan. 25, 2000) (No. 99-423); cert. dismissed, 120 S.Ct. 1265 (2000).

66.No. 99-1240, 2000 WL 122158 (Apr. 17, 2000).

67.See, e.g., Abbott v. Bragdon, 912 F.Supp. 580 (D. Me. 1995), aff'd, 107 F.3d 934 (1st Cir. 1997), (upheld ADA's regulation of dental practice because dental practices affect interstate commerce); United States v. Morvant, 843 F.Supp. 1092 (E.D. La. 1994) (dental practices affect interstate commerce); Pinnock v. International House of Pancakes, 844 F.Supp. 574 (S.D.Cal. 1993) (upheld ADA's regulation of a franchised restaurant because the particular restaurant and the restaurant industry in general affected interstate commerce), cert. denied, 114 S.Ct. 2726 (1994).

68.The Title II regulation requires providers of telephone emergency services, including 9-1-1 services, to provide direct access to individuals who use TDDs and computer modems. In implementing this provision, the Department has participated in litigation, e.g., Ferguson v. City of Phoenix, 931 F.Supp. 688 (D.Ariz. 1996), aff'd, 157 F.3d 668 (1998), cert. denied, 526 U.S. 1159 (1999), and Miller v. District of Columbia, 983 F.Supp. 205 (D.D.C. 1997); investigated and settled complaints (e.g., State of California, Los Angeles, California; Chicago, Illinois; and Raleigh, North Carolina); conducted compliance reviews throughout the country that resulted in more than 50 additional settlement agreements; and published detailed technical assistance on access to telephone emergency services.

69.DOJ has entered into a variety of settlement agreements establishing the right of people with hearing impairments to participate in the judicial process as parties, witnesses, jurors , and spectators and to receive appropriate auxiliary aids. For example, the Department entered into a settlement agreement with the Florida state courts system on behalf of a complainant, a defendant who contended that a Florida court discriminated against her by failing to ensure that its real-time transcription system provided effective communication during the proceedings. The agreement required that all Florida courts ensure that real-time transcription services be accurate in order to ensure effective participation by people who are deaf or hard of hearing and established minimum guidelines for real-time transcriptions.

In Grand Rapids, Michigan, DOJ reached a settlement agreement with a court probation department providing that the court will, upon reasonable notice, secure the services of a qualified interpreter for probation proceedings. An Idaho court entered a similar agreement to resolve a complaint by a deaf individual alleging that he was not provided with effective communication during a small claims court hearing when the judge appointed an unqualified county employee to interpret at the proceeding. In two counties in Mississippi, DOJ entered into two separate settlement agreements to resolve complaints alleging that both counties disqualified a prospective juror who is deaf. The counties agreed to establish a policy to ensure that individuals who are deaf or hard of hearing will not be excluded from jury service or from participation as parties, witnesses, or spectators in any court proceedings because of their disabilities. Other similar settlements regarding communication accessibility in the context of court proceedings were negotiated in other locations, including Pinellas County, Florida; Salt Lake City, Utah; Fulton, Missouri; Pickens Co., South Carolina; and Alexandria, Louisiana).

70.The Department has attempted to ensure that police and sheriff's departments provide appropriate auxiliary aids, including interpreters, when people are in police custody. For example, the Department entered into an agreement with the Oakland (California) Police Department under which the department agreed to take the necessary steps to ensure that members of the public who are deaf or hard of hearing can communicate effectively with police officers. In one instance, an individual had been denied pencil and paper with which to communicate with jail staff. In another, a deaf individual who had borrowed an automobile from a friend was unable to make a telephone call for approximately seven hours (because no operable TDD was available) to clear up charges that he had stolen the automobile. Under the agreement, the police department agreed to adopt and publish policies for effective communication; to purchase at least one additional TDD; to train jail personnel to operate TDDs; to initiate a testing program to ensure that the TDDs are functioning properly; to ensure that one jail cell has a television set with closed-captioning capability; and to provide, during annual in-service police academy training, extensive training on ADA's effective communication requirements to all officers who deal with the public.

DOJ has entered similar settlement agreements with police and sheriff's departments around the country (e.g., Wisconsin State Police; Montgomery County, Maryland; Glendale, Arizona; Roswell, New Mexico; Aurora, Colorado; and Rochester, New York,) requiring them to develop policies and procedures to ensure that appropriate auxiliary aids and services are provided in their interactions with individuals who have hearing impairments. The departments agreed to establish procedures to ensure that deaf individuals who use sign language would have interpreters in circumstances where interpreters are necessary for effective communication—for example, when criminal suspects are being advised of their constitutional rights or being questioned by police. The police departments agreed to train police officers on the appropriate use of interpreter services and to ensure that interpreters are sufficiently qualified.

The Department has also entered formal settlement agreements resolving complaints that police officials did not secure the services of qualified interpreters for deaf inmates and failed to provide TDDs (e.g., Pinellas County, Florida; Bell Gardens, California; Saginaw, Michigan; Lachine, Pennsylvania). The settlements require the police to permit inmates and visitors to have access to 800 numbers for the purpose of making calls through telephone relay services, and to establish procedures for securing the services of qualified interpreters whenever necessary to ensure effective communication with individuals who are deaf or hard-of-hearing.

71.In Padilla v. Ryan, 1998 WL 1156984 (N.D.Cal. 1998), DOJ filed an amicus brief in the Northern District of California in support of a class action lawsuit challenging policies and practices at the Santa Clara County jail that discriminate against persons who are deaf or hard of hearing by denying them access to sign language interpreters, TTYs, and other auxiliary aids and services. The Department's brief argued that the plaintiffs are qualified individuals with disabilities, that ADA requires the provision of auxiliary aids to ensure effective communication, and that the provision of auxiliary aids in this case would not compromise safety or effective prison administration or otherwise result in undue financial and administrative burdens.

In Chester County, Pennsylvania, prison officials agreed to ensure effective communication with inmates who are deaf or hard of hearing and to post signage clearly marking an accessible route to the prison's visiting room. The agreement resolved a complaint alleging that the prison failed to furnish necessary auxiliary aids during individual and group counseling sessions and disciplinary hearings.

The Department also entered a settlement agreement with the Wood County, Ohio, sheriff's department, resolving an ADA complaint filed by a deaf inmate who alleged that he had been disciplined unfairly for missing a head count he had not been informed of, and that he was excluded from jail programs, activities, and services—such as classes, visitation, and the use of telephones—because of a lack of auxiliary aids. Under the agreement, the department agreed to provide interpreter services where necessary for effective communication, to purchase a TDD, and to provide deaf or hard of hearing inmates with individual notification of all building events and emergencies, including meals, recreation, and head counts.

72.DOJ has sought to establish the right of individuals who are deaf or hard of hearing to participate fully in municipal government proceedings. For example, DOJ reached a similar agreement with Clinton Township, Pennsylvania, pursuant to which the board of supervisors agreed to purchase and use an amplification system for town meetings. It entered into a settlement agreement with Pitt County, North Carolina, in resolution of a complaint alleging that the county board of commissioners, after obtaining an assistive listening system, failed to use the system properly to provide effective communication for hard of hearing participants at commission meetings. The settlement agreement requires commission members to use the system microphones to ensure that they can be heard. The board also established a policy by which members of the public can request reasonable modifications in policies, practices, and procedures of the commission.

73.For example, DOJ reached an agreement with the Commonwealth of Virginia Department of Health resolving a complaint alleging that emergency medical technician training provided by Virginia was not accessible to people who are deaf or hard of hearing. The Department of Health agreed to provide sign language interpreters in training programs that require interaction with program moderators, to provide written transcripts in training programs that only require the trainee to view a video, and to publicize the availability of interpreters and transcripts free of charge to people with hearing impairments.

74.In Connecticut Association of the Deaf v. Middlesex Memorial Hospital, No. 395-CV-02408 (D.Conn. 1998), a private suit that ultimately involved all of the acute care hospitals in the state, the Department negotiated a settlement agreement that requires the defendant hospitals to provide interpreters 24 hours a day, seven days a week, for persons who are deaf or hard of hearing; to use sign language pictogram flash cards to assist in communication when sign language interpreters are not available; to provide TTYs throughout the hospitals' public areas and in patient rooms, when requested; and to provide other auxiliary aids and services when necessary for effective communication. In DeVinney v. Maine Medical Center, the Department (through the U.S. attorney) intervened in a private lawsuit that alleged failure to provide a qualified sign language interpreter and other auxiliary aids to a deaf patient in a suicidal state who was admitted to its psychiatric ward. Under the consent decree that resolved the case, the defendant agreed to provide qualified sign language interpreters, assistive listening and telecommunication devices, captioned televisions and other similar aids and services to persons who are deaf or hard of hearing, and to publish and distribute a new written hospital policy directing its employees to offer an interpreter whenever staff members have any reason to believe a patient is deaf or hard of hearing.

75.DOJ has advocated the right of people with vision and hearing impairments to receive appropriate auxiliary aids when taking or preparing to take professional examinations. In a settlement resolving the first ADA lawsuit filed by the Department, U.S. v. Becker CPA Review Ltd., No. CV-92-2879 (D.D.C. 1993), DOJ established that private training providers must ensure effective communication by providing interpreters and assistive listening devices for students with hearing impairments and must provide appropriate training to its staff. A similar lawsuit against Harcourt Brace and Bar/Bri, the nation's largest review course for students taking the bar exam, resulted in the defendants' agreeing to provide qualified sign language interpreters, assistive listening devices, and brailled materials to students with disabilities. U.S. v. Harcourt Brace Legal and Professional Publications, Inc., No. 94-CV-5295 (N.D.Ill. 1994). DOJ has negotiated settlement agreements to resolve similar complaints involving first aid training (American Red Cross, San Francisco, California)' driving schools (Wold Driving School, Wausau, Wisconsin); and childbirth classes (Central Mississippi Medical Center, Jackson, Mississippi).

Recently, DOJ obtained a settlement agreement with the American Association of State Social Work Boards (AASSWB) and Assessment Systems, Inc. (ASI), two national standardized testing agencies, pursuant to which the agencies agreed to provide qualified readers for test takers with vision impairments. Under the agreement, AASSWB and ASI agreed to adopt written policies to ensure that readers are proficient in reading for people with vision impairments, that they are familiar with the examination, and that they work with the test-taker prior to the examination to allow the reader to adapt to the test-taker's style of receiving information. The agreement also permits the testing entities to allow test-takers with vision impairments to supply their own readers.

76.DOJ has championed the right of people with hearing impairments to receive auxiliary aids in recreational and entertainment settings. For example, in 1997, the Department negotiated a comprehensive settlement agreement under which Walt Disney World agreed to provide oral and sign language interpreters at numerous specified attractions at Disney's theme parks upon two weeks' notice; to make captioning systems available without reservation at the entrance to specified rides or shows; to provide transcripts to persons who are deaf or hard of hearing at attractions, and to allow these those individuals an opportunity to ride an attraction promptly a second time in order to better understand the written text. In addition, Disney agreed to schedule interpreters at specified shows, performances, and rides on a rotating basis so that guests can attend all interpreted attractions in one day; to provide closed-captioning on video monitors in queues for attractions throughout the parks; to make schedules available; and to provide assistive listening systems and written transcripts for most attractions for hard-of-hearing guests who desire them.

With regard to an activity that may be considered recreational, or perhaps cosmetic, DOJ entered into a settlement agreement with the Applewood Tanning Center of Omaha, Nebraska, under which the Tanning Center agreed to provide appropriate auxiliary aids and to modify its policies concerning service animals to facilitate participation by customers with vision impairments. The agreement also requires Applewood to make its liability release form available in large print, braille, and audiotape; to read the release at the request of customers with vision impairments; and to allow service animals into any area of its facility where it allows customers, including tanning areas.

77.42 U.S.C. § 12183(a)(1).

78.United States v. Days Inns of America, Inc., 151 F.3d 822 (8th Cir. 1998), cert. denied 119 S.Ct. 1249 (1999) (hotel franchisors can be liable for participation in the design and construction of inaccessible facilities); United States v. Days Inns of America, Inc., 997 F.Supp. 1080 (C.D.Ill. 1998) (hotel franchisor liable for participating in the design or construction of an inaccessible hotel); United States v. Ellerbe Becket, Inc., 976 F.Supp. 1262 (D.Minn. 1997) (architect can be liable); Johanson v. Huizenga Holdings, Inc., 963 F.Supp. 1175 (S.D.Fla. 1997) (architect can be liable). But see, Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, 945 F.Supp. 1 (D.D.C. 1996) (architects not directly liable under Title III).

79.Jennifer Burnett and Lucy Gwinn, "Reality Check.2," *The Mouth*, March-April 1998, p. 39.

80.457 U.S. 307 (1982).

81.Civ. Action No. 87-369-CIV-T-24 (M.D. Fla.).

82.119 S. Ct. 2176 (1999).

83.119 S.Ct. 2139 (1999). The pertinent section of the transcript of the oral argument is found at 1999 WL 281310, pp. 10-11.

84.119 S.Ct. 2133 (1999). The pertinent section of the transcript of the oral argument is found at 1999 WL 274988, pp. 9-11.

85.The pertinent section of the transcript of the oral argument is found at 1999 WL 281310, pp. 10-11.

86.119 S. Ct. 2176 (1999).

87.The pertinent section of the transcript of the oral argument is found at 1999 WL 252681, pp. 20-21. One commentator has argued that the Court's recognition of a financial burden defense in *Olmstead* represents a compounding of error made when the courts manufactured such a defense from a dubious and unsupported dictum in Southeastern Community College v. Davis, 442 U.S. 397 (1979). Armen H. Merjian, "Bad Decisions Make Bad Decisions: *Davis*, *Arline*, and Improper Application of the Undue Financial Burden Defense Under the Rehabilitation Act and the Americans with Disabilities Act," 65 *Brooklyn Law Review* 105 (1999).

88.The pertinent section of the transcript of the oral argument is found at 1999 WL 252681, p. 18.

89.March 18, 1999 brief for the United States as Amicus Curiae Supporting Respondents at 19. DOJ also noted that the same argument regarding deference to the states professionals was made by the plaintiff's counsel during the argument. 1999 WL 25281, p. 15.

90.117 F.3d 579 (D.C.Cir. 1997), cert. denied, 523 U.S. 1003 (1998).

91.Id. 117 F.3d at 589.

92.See http://www.usdoj.gov/crt/foia/cltr204.txt.

93.At http://www.usdoj.gov/crt/508/508home.html.

94.The one-page description of the obligations of gasoline service stations in regard to equal access to gas pumps, found on the DOJ's ADA Web site, at http://www.usdoj.gov/crt/ada/gasserve.htm, describes the obligation of gas stations to provide fueling assistance upon request but says nothing about any obligation to have accessible pumps.

95.28 C.F.R. § 36.104.

96.28 C.F.R. Part 36, App. B (discussing § 36.309 of the proposed rule).

97.Id. (discussing 28 C.F.R. §§ 36.201, 36.202, & 36.304).

98.On January 29, 1999, DOJ issued a press release titled "Justice Department Sues Major Movie Theater Chain for Failing to Comply with ADA," describing DOJ's filing a lawsuit in U.S. District Court in Los Angeles, alleging that American Multi-Cinema, Inc. and AMC Entertainment violated ADA by denying movie-goers who use wheelchairs access to stadium-style seating. The release is on the DOJ Web site at http://www.usdoj.gov/crt/ada/amcpress.htm.

99.See the cases listed in note 44 above.

100.Wyatt v Hanan, U.S. Amicus Curiae, p. 13.

101.Letter from John L. Wodatch, chief, Disability Rights Section, U.S. Department of Justice to Michael Auberger, ADAPT, Denver, Colorado, and Bob Kafka, ADAPT, Austin, Texas, July 6, 1998.

102.*Helping State and Local Governments Comply with ADA: An Assessment of How the United States Department of Justice is Enforcing Title II, Subpart A, of the Americans with Disabilities Act,* United States Commission on Civil Rights, Washington, D.C., 1998, p.94.

Ironically, in a policy statement about the Civil Rights of Institutionalized Persons Act (CRIPA), DOJ has stated, "The focus of the Department's CRIPA enforcement program is not on closing institutions. In fact, to date no institutions have closed as a result of the Department's CRIPA enforcement actions." "CRIPA Enforcement Policy and Community Placement," U.S. Department of Justice, Office of the Assistant Attorney General, November, 1995.

103.See DOJ News Release, February 8, 2000, "Bill Lann Lee Hails Administration Request for Increased Civil Rights Funding in FY 2001."

3. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

3.1 Organization and Structure

The Equal Employment Opportunity Commission (EEOC) is the primary agency for enforcement of Title I of the Americans with Disabilities Act (see Figure 3-1). The EEOC is responsible for developing and issuing regulations for Title I, receiving and resolving complaints of employment discrimination, initiating litigation for Title I violations and filing amicus briefs, and setting policy for the interpretation and enforcement of Title I.

The EEOC was established in 1965 to carry out enforcement of Title VII of the Civil Rights Act of 1964. Since then it has also been given responsibility for enforcement of the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA), Section 501 of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act (ADA). Its overall mission is "...to promote equal opportunity in employment by enforcing the federal civil rights employment laws through administrative and judicial actions, and education and technical assistance."[1] The EEOC defines the functions associated with its administrative and judicial responsibilities to include investigation, adjudication, settlement, and conciliation of charges; resolution of claims using other forms of alternative dispute resolution; litigation; and the issuance of policy guidance. The functions associated with the education and technical assistance responsibilities are defined to include outreach to employers and employees and the groups or organizations that represent them; seminars, training sessions, technical assistance site visits, speeches, and meetings with constituent groups; and information and guidance on the issues and laws related to employment discrimination.[2]

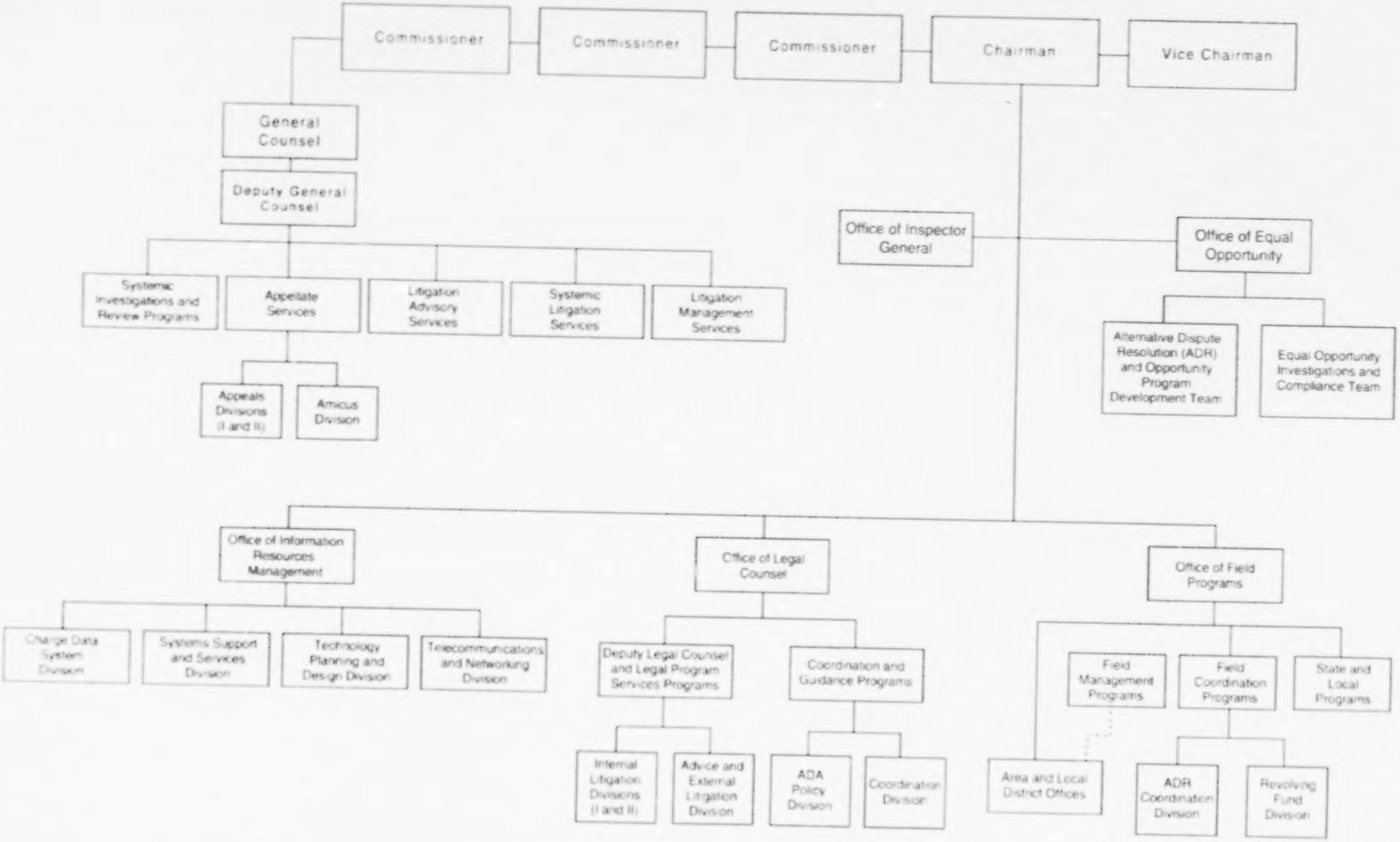
The EEOC is headed by five commissioners, appointed by the president and confirmed by the U.S. Senate. All major decisions about policy, organizational structure, staffing and budget are made by the commissioners.[3] One of the commissioners is designated chairman, and is responsible for implementation of EEOC policy and administration; the vice chairman, also a commissioner, serves as acting chairman in the absence of the chairman. The work of the EEOC occurs in the headquarters office in Washington, D.C., and in 50 field offices spread across the nation. This work is augmented by state and local fair employment practices agencies (FEPAs) under contract with the EEOC for the processing of "dually filed" charges that allege a violation of a statute enforced by the EEOC and a state or local antidiscrimination law.

At the Washington headquarters of the EEOC, the Office of the General Counsel, the Office of Legal Counsel, and the Office of Field Programs are most directly involved in ADA Title I policy development and enforcement. The Office of the General Counsel oversees six units: (1) Administrative and Technical Services Staff, (2) Research and Analytic Services Staff, (3) Systemic Enforcement Services, (4) Appellate Services, (5) Litigation Management Services, and (6) Litigation Advisory Services.[4] These units are involved with EEOC litigation, including the decision to litigate, litigation in trial courts, overseeing litigation in field offices, EEOC pattern or practice litigation, providing expert advice on cases in litigation, tracking data on cases in litigation, and appeals of EEOC cases or EEOC participation as amicus curiae in private litigation. The Office of Legal Counsel is responsible for regulations, guidance, policy decisions, and legal advice with respect to the statutes enforced by the EEOC. One of the three divisions of the Office of Legal Counsel is the ADA Policy Division. This division has principal responsibility for interpreting ADA and Sections 501 and 504 of the Rehabilitation Act for the EEOC, developing policy guidance, and providing technical assistance on ADA to other staff of the EEOC, the field offices, the FEPAs, and other organizations.[5]

The Office of Field Programs also has a major role in ADA enforcement because it oversees the investigation, conciliation, and resolution activities of the EEOC field offices and the FEPAs (see Figure 3-2). Charge filing and processing occur in the field offices. Alternative dispute resolution activities, training and technical assistance, and the monitoring of the field offices and the FEPAs are also the responsibility of the Office of Field Programs.

Figure 3-1

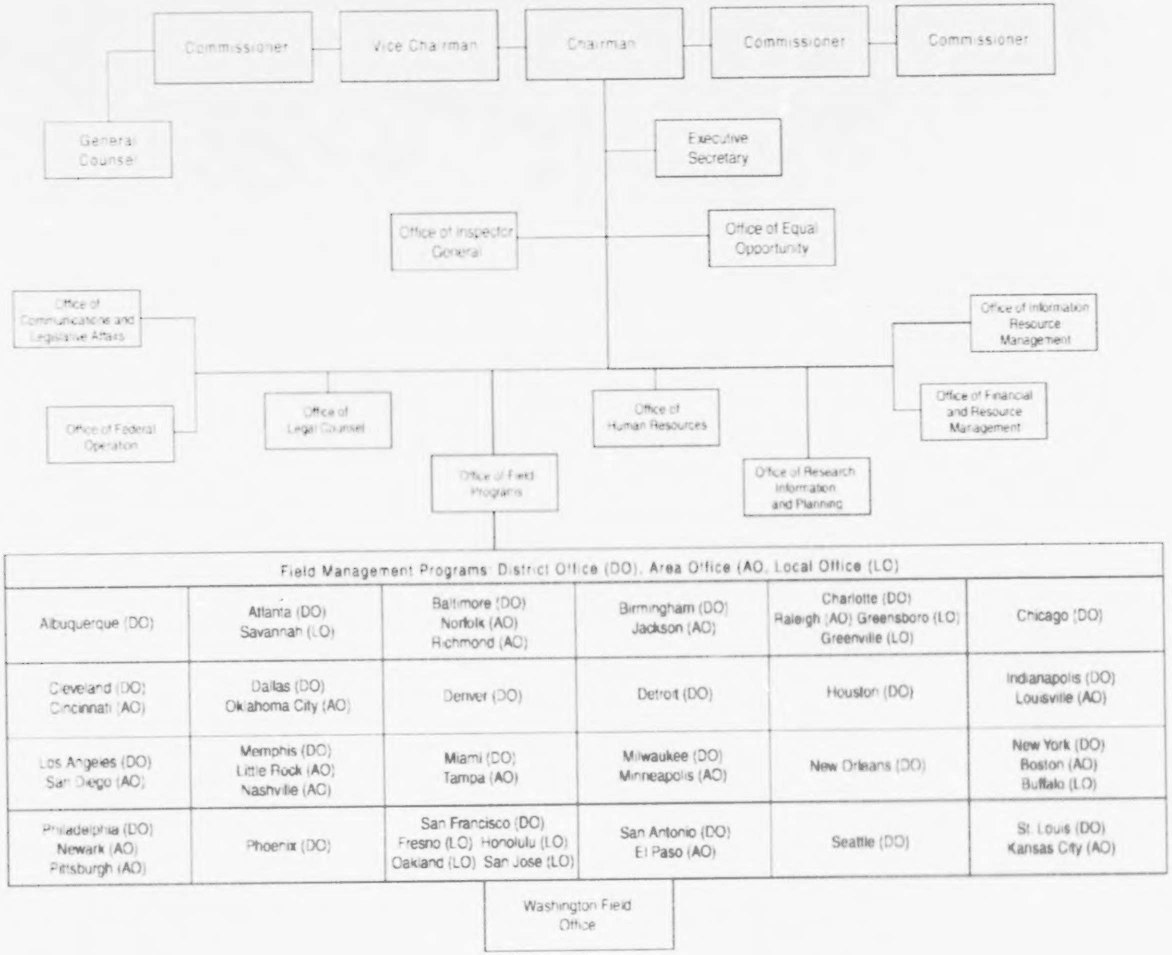
EEOC Organizational Chart


Commissioner
Commissioner
Commissioner
Chairman
Vice Chairman
General Counsel
Deputy General Counsel
Systemic Investigations and Review Programs
Appellate Services
Litigation Advisory Services
Systemic Litigation Services
Litigation Management Services
Appeals Divisions (I and II)
Amicus Division
Office of Inspector General
Office of Equal Opportunity
Alternative Dispute Resolution (ADR) and Opportunity Program Development Team
Equal Opportunity Investigations and Compliance Team
Office of Information Resources Management
Charge Data System Division
Systems Support and Services Division
Technology Planning and Design Division
Telecommunications and Networking Division
Office of Legal Counsel
Deputy Legal Counsel and Legal Program Services Programs
Coordination and Guidance Programs
Internal Litigation Divisions (I and II)
Advice and External Litigation Division
ADA Policy Division
Coordination Division
Office of Field Programs
Field Management Programs
Field Coordination Programs
State and Local Programs
Area and Local District Offices
ADR Coordination Division
Revolving Fund Division

BEST COPY AVAILABLE

Figure 3-2.

EEOC Field Management Programs


Commissioner
Vice Chairman
Chairman
Commissioner
Commissioner
General Counsel
Executive Secretary
Office of Inspector General
Office of Equal Opportunity
Office of Communications and Legislative Affairs
Office of Information Resource Management
Office of Federal Operation
Office of Legal Counsel
Office of Human Resources
Office of Financial and Resource Management
Office of Field Programs
Office of Research Information and Planning
Washington Field Office

Field Management Programs: District Office (DO), Area Office (AO, Local Office (LO)

Albuquerque (DO)	Atlanta (DO) Savannah (LO)	Baltimore (DO) Norfolk (AO) Richmond (AO)	Birmingham (DO) Jackson (AO)	Charlotte (DO) Raleigh (AO) Greensboro (LO) Greenville (LO)	Chicago (DO)
Cleveland (DO) Cincinnati (AO)	Dallas (DO) Oklahoma City (AO)	Denver (DO)	Detroit (DO)	Houston (DO)	Indianapolis (DO) Louisville (AO)
Los Angeles (DO) San Diego (AO)	Memphis (DO) Little Rock (AO) Nashville (AO)	Miami (DO) Tampa (AO)	Milwaukee (DO) Minneapolis (AO)	New Orleans (DO)	New York (DO) Boston (AO) Buffalo (LO)
Philadelphia (DO) Newark (AO) Pittsburgh (AO)	Phoenix (DO)	San Francisco (DO) Fresno (LO) Honolulu (LO) Oakland (LO) San Jose (LO)	San Antonio (DO) El Paso (AO)	Seattle (DO)	St. Louis (DO) Kansas City (AO)

The EEOC enforcement structure for Title I of ADA is the same structure used for the other civil rights statutes enforced by the EEOC. Within the Office of the General Counsel, there are no ADA-specific offices or staff. The same is true for the Office of Field Programs. Thus, ADA enforcement occurs via an organizational structure aimed at enforcing civil rights laws generally, not a structure uniquely developed for the enforcement of ADA. This structure presumes that the methods and issues of enforcement are similar across the various statutes for which the EEOC has responsibility and requires that staff be well-informed generalists. To the extent that complaints often have multiple bases (e.g., race and disability, gender and disability), this structure is sensible. In interviews conducted by the U.S. Commission on Civil Rights, staff at headquarters and in the field offices also felt that the generalist approach was more efficient and allowed a flexible approach to the flow of complaints.[6] However, the generalist approach does require that staff be knowledgeable (and trained) in the issues and perspectives that may be unique to each of the covered population groups.

3.1.1 Budget and Staffing

Despite the addition of ADA enforcement to its responsibilities, the EEOC did not see an addition to its budget in real dollars until FY 1999.[7] ADA enforcement not only required the development of regulations, guidance, training, and technical assistance, it also resulted in the receipt of additional charges of employment discrimination. Since ADA enforcement began in July 1992, the number of charges of discrimination received by the EEOC has increased noticeably. The U.S. Civil Rights Commission analysis of the increase between 1991 and 1993 concludes that ADA charges account for most of the increase in this period and that ADA charges continue to account for a substantial portion of the increased charge workload of the EEOC.[8] In partial response to this increase, the EEOC changed the manner in which it processes charges (see discussion of complaint processing), and that has resulted in an increase in the number of resolutions per staff member.[9] However, because the investigative staff of the EEOC stayed fairly constant between 1991 and 1995 while the number of charges filed increased, the average caseload per staff member rose from 63 to 145.[10]

The EEOC's budget appropriation for FY 1998 was $242 million. Of this, $27.5 million was for contract payments to the FEPAs. Approximately 90 percent of the agency's budget is allocated to salaries, benefits, and rent, allowing 10 percent for litigation support, technology, and staff training.[11] At the end of FY 1998, the EEOC reports it had 2,544 full-time employees, well below the 3,390 employees it had in 1980, before the implementation of ADA and the expansion of charges.[12] Congress has approved a FY 1999 appropriation of $279 million, a 15.3 percent increase over FY 1998.[13] Of this, $29 million will pay for FEPA services. The increase will also result in the hiring of 12 trial attorneys for the field offices and approximately 48 additional investigators.

3.1.2 Planning Activities

Since 1994, the EEOC has engaged in significant self-evaluation and strategic planning. In October 1994, former EEOC chairman Gilbert F. Casellas appointed three task forces, each to examine a different aspect of agency process and function. The Charge Processing Task Force considered ways to increase the efficiency of charge processing and reduce the increasing backlog of charges.[14] It reported its recommendations in March 1995, and they were largely adopted by the EEOC in April 1995.[15] The most significant change resulting from this task force involved terminating the policy of fully investigating every charge and substituting a priority system for handling charges that allows the EEOC to fully investigate some charges but not others. The new charge priority system is discussed in more detail in the section on complaint processing.

A second task force, the EEOC/FEPA Task Force, reviewed and assessed the relationship between the federal EEOC offices and the state and local FEPAs.[16] Because the FEPAs process a large number of complaints for the EEOC (those that are dually filed under federal and state law), the EEOC needs to ensure that complaints filed under a federal statute are properly determined, even if the FEPA has performed the investigation and reached a determination. This task force made a number of recommendations to change the manner in which the EEOC provides oversight of the FEPA/EEOC contract activities. These included proposals to reduce the reporting burden experienced by both the EEOC and the FEPAs related to transferring information about complaints between them and to reduce the EEOC's "micromanagement" of FEPA activities, once a FEPA has been certified by the EEOC.[17]

The Task Force on Alternative Dispute Resolution (ADR) was the third task force. It examined the various means that the EEOC could use to produce resolutions of discrimination complaints without litigation and recommended how such techniques could be integrated into the new charge processing procedure.[18] Further discussion of the ADR initiative is in section 3.3.6.

Following the work of the three task forces, in 1996 the EEOC developed a National Enforcement Plan (NEP) establishing the agency's overall priorities for civil rights enforcement. The NEP articulates three areas of focus for EEOC enforcement: "(1) prevention through education and outreach; (2) the voluntary resolution of disputes; and (3) where voluntary resolution fails, strong and fair enforcement."[19] The NEP also describes the EEOC's "strategic enforcement strategy" to enable it to use its limited enforcement resources proactively for greatest effect.[20] Enforcement priorities are listed in three major categories, with a series of subcategories. While most of the priorities listed could involve an ADA complaint, four subcategories specifically list ADA or persons with disabilities. One of the subcategories that includes disability focuses specifically on the intersection of covered bases, such as disability and race or national origin. All of these subcategories are found within the larger priority to focus on "claims presenting unresolved issues of statutory interpretation."[21]

The U.S. Commission on Civil Rights questioned staff members at EEOC headquarters and in a couple of the district offices about the impact of the NEP. These individuals reported that while the work and workload had not changed dramatically, they did have a greater sense of priorities and focus and strategic decision making about cases.[22] Following adoption of the NEP, each district director and regional attorney were also required to develop a Local Enforcement Plan (LEP). The LEPs were to reflect the particular priorities of their geographic area within the larger context of the National Plan priorities. Initially, the LEPs used a variety of methods to develop their priorities and formats to present them. In recognition of concerns about a lack of consistency among the LEPs, the 1998 joint report of the Priority Charge-handling Task Force and the Litigation Task Force recommended means for greater consistency across the local plans and with the national plan.[23] In response, the Office of Field Programs (OFP) and the Office of the General Counsel (OGC) developed a set of instructions intended to ensure that a consistent format is used in the development of the LEPs. It is difficult to judge at this time the extent to which the local plans tailor their settings to the national plan or whether they continue to chart independent courses.

Finally, the EEOC developed a strategic plan, issued in August 1997 in accordance with the requirements of the Government Performance and Results Act of 1993. The *Strategic Plan 1997-2002* primarily reviews the accomplishments of the EEOC since 1994 and reiterates the goals articulated through the NEP and the recommendations of the three task forces. Under the leadership of the new Chairwoman of the EEOC, Ida L. Castro, the EEOC has targeted for its 1999 priority initiatives "improved communications and enhanced outreach to minorities, women, and the disability community."[24]

All these efforts have produced change at the EEOC. The fact that the task forces worked quickly, that their recommendations were largely accepted, and that those accepted were promptly implemented is impressive. Faced with a rising workload and a flat budget, the EEOC responded to the rising backlog that this caused in a proactive fashion through self-evaluation and the proposal of feasible structural changes.

3.2 Regulatory Activities and Policy Development

The EEOC develops policy through three avenues: the development and publication of regulations, the issuance of policy and enforcement guidance, and selective and strategic litigation. With respect to ADA, the EEOC has actively utilized all three strategies. In addition, in partnership with the Department of Justice, the EEOC has organized cross-agency ADA coordination meetings. The coordination meetings started when ADA was new and included not only the ADA Policy Division staff of the EEOC and ADA staff from the Department of Justice, but also persons with ADA interests and responsibilities from such other agencies as the Departments of Labor, Health and Human Services, and Education. The focus of the coordination meetings was to identify policy issues that needed clarification or coordination across agencies. Topics for guidance were sometimes identified or discussed at a meeting, as well as other emerging issues for which a policy position might need to be developed. The coordination meetings took place monthly for a long time; currently they take place less regularly, although other forms of coordination and consultation continue to occur. At both the EEOC and the Department of Justice, the reduced frequency of coordination meetings is attributed to the fact that many of the most pressing issues have been handled.

3.2.1 Title I Regulations

A key ADA regulatory responsibility of the EEOC is the development and issuance of regulations for Title I of ADA. As required by the statute, the Title I regulations were issued by the EEOC within one year of the law's passage, on July 26, 1991. Since that date, the EEOC has also issued regulations on ADA record-keeping and reporting requirements and on coordination procedures for the processing of complaints filed under both ADA and the Rehabilitation Act.

In development of the Title I regulations, the EEOC published an advance notice of proposed rulemaking in August 1990 and solicited public comment. In addition to the written comments received, the EEOC also conducted 62 meetings throughout the country. Comments and responses were received from persons with disabilities, employers, lawyers, disability advocates, and physicians. Following the development of the proposed Title I regulations, comments were again received during the period following the publication of the notice of proposed rulemaking issued on February 28, 1991.[25] The EEOC feels that it both solicited and effectively received comments on the proposed regulations from the disability community, as well as from employers, labor attorneys, and other business interests. The U.S.

Commission on Civil Rights report summarizes the content of the comments received and notes that the comments are generally targeted at the aspects of ADA and its regulations that continue to elicit criticism and confusion in interpretation. These include the definition of disability (this was of particular concern to people with disabilities and disability advocacy organizations) and the requirements for reasonable accommodation, the determination of undue hardship, and the interpretation of direct threat (this was of particular concern to employers).[26]

3.2.2 Policy and Enforcement Guidance

The EEOC has acted to advance policy development by providing policy and enforcement guidance on a number of topics for which it has deemed further interpretive assistance is needed. To date, 12 enforcement guidances that have significant relevance to ADA have been issued. These are listed in Table 3-1. In addition to the guidances, the EEOC has issued some shorter documents that also offer guidance (also in Table 3-1) and a Title I Technical Assistance Manual and Resource Directory. Together, these documents have elaborated on the key definitions in the statute and provided more detailed and specific methodologies for compliance with requirements regarding such issues as preemployment disability-related inquiries and medical examinations; defining disability; the interactions of ADA with workers compensation; the interaction between application for disability insurance and coverage under ADA; the Family and Medical Leave Act; the employment and accommodation requirements of ADA for persons with psychiatric disabilities; and reasonable accommodation issues in general.

The topics for which guidance needs to be provided are determined through a process that starts in the Office of Legal Counsel. The experience of the EEOC investigators and attorneys, the types of questions that come into the Commission, the suggestions of commissioners, and informal information gathered from staff as they speak around the country and speak with people with disabilities are all sources of information that may influence the identification of a topic for guidance. The Office of Legal Counsel then works with a committee with representatives from the commissioners and other units within EEOC.

A proposed policy guidance goes through review in several offices; the final step is review and approval by the commissioners.

Some of the guidances have been well received in both the business community and among people with disabilities and have been relatively uncontroversial. Others (including, in particular, the guidance on ADA and psychiatric disabilities) have been viewed as controversial by employers.

Interviews in January and February 1999 with persons outside the EEOC who are familiar with Title I identified reasonable accommodation as a topic for which a guidance from the EEOC would be helpful. On March 1, 1999, the EEOC issued a new enforcement guidance, "Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act."

Both inside and outside the EEOC, the research team was told that the EEOC guidances have had some effect in guiding judicial interpretations of ADA. While not every court decision has concurred with the EEOC interpretation set out in a guidance, the feeling is that the EEOC guidances are having some impact. The strengths and weaknesses of substantive policy positions taken by the EEOC are discussed in section 3.9.

Table 3-1
EEOC Enforcement Guidance and Related Documents—ADA Related

Title	Date of Issue
Instructions for Field Offices Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified"	7/26/99
Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act	3/1/99
Section 8 of the New Compliance Manual on "Retaliation"	5/20/98
Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms	12/8/97
Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment	7/10/97
Enforcement Guidance on Equal Employment Opportunity Commission & Walters v. Metropolitan Educational Enterprises, Inc., 117 S.Ct. 660 (1997)	5/2/97
EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities	3/25/97
EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person Is a "Qualified Individual with a Disability" Under the Americans with Disabilities Act of 1990 (ADA)	2/12/97
Letter to National Labor Relations Board stating the Commission's position that, under limited specified circumstances, Title I of the ADA permits an employer to give a union medical information about an applicant or employee.	11/1/96
Enforcement Guidance on O'Connor v. Consolidated Coin Caterers Corp.	9/18/96
EEOC Enforcement Guidance: Workers' Compensation and the ADA	9/3/96
Enforcement Guidance: Whether "Testers" Can File Charges and Litigate Claims of Employment Discrimination	5/22/96
Enforcement Guidance on After-acquired Evidence and McKennon v. Nashville Banner Publishing Co., 115 S.Ct. 879, 65 EPD Par. 43,368 (1995)	12/14/95
ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations	10/10/95
Enforcement Guidance: Questions and Answers About Disability and Service Retirement Plans Under the ADA	5/11/95
Compliance Manual, Section 902: Definition of the Term "Disability"	3/14/95
Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-based Distinctions in Employer Provided Health Insurance	6/8/93
Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory	7/14/92

Source: EEOC, Enforcement Guidances and Related Documents, at www.eeoc.gov/publicat.html, last updated February 15, 2000.

3.2.3 Litigation as Policy Development

Strategic choices in cases for direct litigation or participation as amicus curiae offer an additional avenue for policy development. Within the EEOC, the Systemic Enforcement Services unit pursues cases on behalf of the EEOC that address novel or problematic legal issues, where a case decision can set policy. The Appellate Services unit addresses policy by amicus briefs in private litigation in the courts of appeal and through appeals of the EEOC's own cases. Table 3-8 in section 3.5 lists the topics that have been the focus of EEOC litigation through trial, appeals, and amicus participation. Greater discussion of EEOC litigation procedures can be found in section 3.5, and the substantive policy decisions taken by EEOC in litigation and otherwise are discussed in section 3.9.

3.2.4 Findings and Recommendations

Finding 17: The EEOC issued its regulations for the enforcement of Title I in a timely fashion and with input from the public and has issued a number of enforcement guidances and related policy documents to clarify Title I requirements.

Finding 18: The EEOC has developed National and Local Enforcement Plans that articulate the agency's strategies for utilization of its resources, including, specifically, aspects of its ADA enforcement activities.

- Local enforcement plans have not always been consistent with enforcement priorities established in the National Enforcement Plan. The EEOC has developed instructions intended to establish such consistency in its LEPs and NEPs.

Recommendation 21: The EEOC should ensure that local enforcement plans are fully consistent with the National Enforcement Plan and the priorities it establishes.

Local plans need not be totally uniform and can account for geographical, population, and other differences, but they should generally follow the same enforcement priorities as are established in the National Enforcement Plan. The LEPs should be regularly reviewed to ensure that they cover the same basic areas and are consistent with the NEPs.

3.3 Charge Processing

A key enforcement activity of the EEOC is the receipt, investigation, and resolution of individual charges of employment discrimination. Charges under any of the federal laws enforced by the EEOC are received by the EEOC field offices or by a state or local Fair Employment Practices Agency. Most charges are filed by individuals; however, EEOC commissioners may initiate a charge even when no individual complainant has come forward. Complainants may state a charge under more than one statute (e.g., Title VII and ADA) and may raise more than a single issue. Charge processing follows the same procedures regardless of the federal statute under which the charge is filed. In general, charge processing involves several steps: intake, categorization, investigation, and resolution/closure. The nature and extent of the information developed at each step will vary substantially depending upon how the charge is categorized (See discussion in section 3.3.2). The charge may also be withdrawn from EEOC processing at the request of the charging party.

3.3.1 Charge Intake

The first step of a discrimination complaint involves the charge intake. The charging party may contact one of the 50 field offices of the EEOC or a state or local Fair Employment Practices Agency to file the charge. A copy of a charge first filed with a state or local FEPA that is also covered by federal law is sent on to the EEOC and entered in its database system. At intake, the charging party is interviewed and information about the charge is obtained. The purpose of the intake interview is to assist in the subsequent categorization of the charge and in the preparation of the formal charge. A manual, *Priority Charge Handling Procedures,* specifies the "essential elements" of the initial intake.[27] These include

- explicitly informing the charging party that he or she has a right to file a charge and that a formal charge must be filed to preserve the right to file a private suit
- informing the charging party that the EEOC must provide a notice of the charge to the respondent

- warning the charging party about the risk of retaliation and that retaliation is itself a violation of federal discrimination law
- noticing and responding to the particular needs of charging parties to ensure that the explanation of the process is in a format accessible to the charging party (includes consideration of language and communication media)
- counseling the charging party about the likely process where the charge appears to be weak, but not discouraging the filing of the charge
- providing the charging party with their "best initial assessment" of the evidence to assist the charging party in decisions about whether and how to proceed
- conveying to the charging party "fairly and honestly" the status of the case, how it fits within the agency's priority procedures, and what can be expected to happen.

Whether the initial contact occurs in person, by phone, or by mail, the procedures manual specifies that the charge receipt process should include an interview with the charging party conducted by experienced personnel. The EEOC has developed an intake form, EEOC Form 5, through which the complainant formally files the charge. The exact procedures used to conduct the intake interview—including whether intake is performed by a dedicated intake staff or by rotating investigative staff—and the extent of attorney involvement in the intake assessments varies among the EEOC offices.[28] Some of the field offices insist that the intake interview take place in person, while others allow telephone interviews where it is difficult for the charging party to get to the office. Some offices augment the information provided in person through the use of videos and information packets. In response to a recommendation of the joint task force report of 1998, the Office of Field Programs collected various materials developed by the field offices and made them available to all offices. The joint task force also recommended that several of the offices at EEOC headquarters assess what information should be centrally developed and distributed.[29]

One way in which the intake of an ADA charge differs from the general intake procedures involves the need to determine if the charging party has a disability that falls under ADA. As part of this process, the charging party is asked to sign an authorization to release medical and other information (EEOC Form 626). Field offices report some variation as to whether all ADA complainants are automatically asked to sign the release or whether only those where the disability is not visible or evident are asked.[30] The need for verification of a disability means that the decision about whether the individual is covered by ADA may not occur during the intake interview. In assessing whether a disability has been verified, the EEOC relies heavily on medical information to determine disability.

The Supreme Court recently issued several ADA decisions that had significant impact on the EEOC's processing of charges: *Cleveland v. Policy Management Systems Corp.*,[31] *Sutton v. United Airlines*,[32] *Murphy v. United Parcel Service*,[33] and *Albertsons, Inc. v. Kirkingburg*.[34] In response, the EEOC issued field instructions entitled *Instructions for Field Offices Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified,"* which modified previous field instructions and emphasized the individual analysis that should be used in determining whether a charging party has a disability as defined by ADA and whether a person is qualified. In addition, the instructions provided advice to field staff responsible for collecting and analyzing evidence under ADA. The content of these instructions is discussed in subsection 3.9.2.

3.3.2 Charge Priority Categorization

The second step in charge handling is the categorization of the charge as Priority A, B, or C. This categorization is a new procedure, instituted in 1995, following the recommendations of the Charge Processing Task Force. The move to a charge priority procedure was stimulated in large part by the growing backlog of unresolved charges experienced in the early 1990s. According to the Task Force Report, 125,000 pending charges were expected by the end of FY 1995. Charges considered "backlog" were those older than 180 days. There were 68,000 such charges in the pending inventory in February 1995, with an average processing time for all charges of over 300 days.[35]

The Charge Processing Task Force attributed this backlog and the long processing time to a combination of factors related to the manner in which the EEOC handled charges. Among the factors identified were the requirement for "full investigation" of all charges, even where it was evident from the start that the charge had little merit and further investigation would not likely change that; the absence of a policy about agency enforcement priorities as a means to focus limited agency resources; minimal use of early resolution techniques, such as alternative dispute resolution; the issuance of substantive "no cause" letters of determination; and the linking of reasonable cause determinations and litigation actions. This assessment resulted in a number of recommendations. Among them was the elimination of the policy of full investigation of all charges and the institution of a priority categorization of charges that would focus investigation activities.[36]

Under the new policy, all charges are categorized as A, B, or C. Category A charges are those that fall within the national or local enforcement plans, cases where further investigation is expected to produce a cause finding, and cases where irreparable harm may result without expedited processing. Category B charges are those that initially appear to have some merit but need further evidence to determine whether a cause finding is likely. These cases will be investigated as resources permit (following Category A) with the aim to determine whether they should be reclassified as A or C. Category C charges are labeled "charges suitable for dismissal." Charges are placed in this category if there is no jurisdiction, the charging party fails to state a claim, the charges are unsupported, the evidence is weak or circumstantial, or the allegations are not credible or self-defeating. Category C charges include charges dismissed where there is sufficient information to indicate that further investigation will not likely result in a cause finding.[37] The determination of the charge priority category is to take place as quickly as possible. It is made by the investigators with supervisory review and, where appropriate, with assistance from legal staff. Field offices are encouraged to quickly dismiss charges in Category C.[38]

ADA charges are approximately 22 percent of all charges filed with the EEOC. Table 3-2 displays the distribution of initial categorization across the four statutes the EEOC enforces. The distributions indicate that the majority of charges are initially categorized as B. From Table 3-2, there does not appear to be much difference, overall, in the initial priority categorization by statute, except that a larger proportion of EPA cases are classified as A compared with the other statutes. ADA charges are distributed across the categories in a proportion similar to the distributions for the other statutes. However, an analysis of the distribution across the field offices performed by the U.S. Commission on Civil Rights shows there is some variation across the offices. Some of the field offices initially categorize fewer than 10 percent of the charges as C, while others classify in excess of 40 percent of the complaints to category C.[39]

Table 3-2
Initial Priority Categorization Across EEOC Enforcement Statutes

	ADA	Title VII	ADEA	EPA
Priority A	15	13	12	**27**
Priority B	59	60	61	57
Priority C	26	27	27	16
Total	100 percent	100 percent	100 percent	100 percent

Source: U.S. Commission on Civil Rights, Helping Employers Comply with the ADA, September, 1998, p. 194.

Category A charges are generally broken further into A-1 or A-2. A-1 charges are those that are initiated as commissioner charges, coincide with NEP/LEP issues, or present a possible cause finding with litigation potential. These generally have the highest priority for both investigation and litigation. A-2 cases are those with a possible cause finding without litigation potential for the EEOC because they do not fit the national or local priorities, are cases for which DOJ has litigation responsibility, or are suitable for the private bar.

The charge priority system applies only to those cases filed and processed by the EEOC. Charges that come in through a FEPA are not given a priority. A very small number of FEPA-processed charges have an assigned priority, usually because they were transferred from the EEOC to a FEPA.

3.3.3 Charge Investigation

Charge investigation is a primary activity of the EEOC. Investigations are performed by the EEOC field offices or by a FEPA under contract with the EEOC. An investigation starts by informing the respondent about the charge against it. This is done with a formal notice (EEOC Form 131 or 131-A) that includes pertinent information about applicable statutes, EEOC rules and regulations, requirements for the preservation of records, use of an attorney, and the prohibition of retaliation against the complainant. Investigations are performed by staff members trained for investigation of discrimination complaints and in the requirements of the statutes enforced by the EEOC. Investigators generally do not specialize in specific laws, although some offices are experimenting with having a staff member with special expertise in ADA. Most offices are organized with investigations units, although a couple have developed a team that includes attorneys. The Joint Task Force report recommends that field agencies try to use a model that increases the communication and collaboration between investigators and attorneys during the charge investigation process, both to facilitate an appropriate classification of a charge and to aid in case development in line with the national and local enforcement plans.[40] Information collected by the Joint Task Force and from other interviews suggests that while the historic divide between the investigators and attorneys has been diminishing over the past several years, there is still a greater need for team work in the prioritization of charges and the identification and development of specific cases for litigation.

There has been some discussion as to whether investigators should be generalists or specialists. So far, the consensus from Headquarters and the field offices seems to be that specialization is not necessary and not efficient. However, ADA does present some issues for investigation that are new to the investigative process (also noted in the Joint Task Force Report). Among the new issues that investigators must factor into their case prioritization and investigative determinations are whether the medical evidence supports the presence of a covered disability, the definition of essential job functions, and the range of available reasonable accommodations. In fact, the Joint Task Force acknowledges that generalists may not be adequately prepared for all cases by suggesting that outside experts may need to be retained in the prelitigation, investigative, or conciliation stages of some ADA charges.[41]

Approximately 35 percent of employment discrimination charges in the national workload are investigated and determined by FEPAs. Where cases are initially filed at a FEPA but dually covered under state and federal law, the FEPA may retain the case for processing. Contracts between the EEOC and the FEPA provide for federal reimbursement for case processing. A number of procedures have developed through which the EEOC offices monitor FEPA processing of federally covered charges. These involve "designation" and later "certification" of the FEPA under EEOC regulations. A FEPA must spend four years in designated status, during which 100 percent of its EEOC contract cases are reassessed in a Substantial Weight Review before being able to be certified. A certified FEPA is an agency that has demonstrated consistent high quality in conforming to EEOC guidelines in its charge processing. A certified agency has 10 percent of the charges it processes (recently reduced from 25 percent) subjected to a follow-up Substantial Weight Review by the EEOC. Additional reporting requirements by the FEPAs also aim to ensure that charge outcomes are consistent with the applicable federal statute. The EEOC/FEPA Task Force found that fewer than 4 percent of the resolutions produced by FEPAs were later rejected by the EEOC as incorrect.[42]

Because many states had fair employment practices laws prior to ADA, not all FEPAs are enforcing disability discrimination statutes that are similar in their provisions to ADA. Some state statutes use a different definition of disability; others do not include a requirement for reasonable accommodation; and others apply to employers with fewer than 15 employees. One concern in using FEPAs to investigate and determine ADA cases is whether their staffs are adequately informed about the provisions of ADA, whether they are applying the correct ADA standards to their investigations, and whether they are knowledgeable about disability issues and discrimination. The EEOC has endeavored to determine where there are substantial differences between the disability discrimination law enforced by a FEPA and the provisions of ADA. Where there are differences, the FEPA is not certified to investigate

ADA cases. As an additional measure of quality control, the certified FEPAs have 100 percent of their ADA case findings subjected to a Substantial Weight Review. While there were no data to indicate that FEPA investigations were substantively any different, this question was raised in interviews as an area that might merit a careful look. From an alternative perspective, the FEPAs may have more expertise at investigating disability cases, as many of them have two decades of experience in enforcing a disability discrimination law. Researchers spoke to several private attorneys in different regions of the country who expressed different preferences for filing with the EEOC or with their local FEPA, depending upon their sense of the competence of agencies in their localities.

3.3.4 Charge Resolution and Charge Closure

Charges may be closed at a number of points following filing, including closures that occur before an EEOC determination is made. In fact, the EEOC encourages predetermination settlements. Resolved charges can be classified into several broad categories that describe the type of resolution achieved. Resolutions before a determination are listed as "settlements," "withdrawals with benefits," or "administrative closures." Charges are administratively closed for a variety of reasons that include failure to locate the charging party, charge not filed in time, charging party failed to accept full relief, charging party withdrew the charge without benefits, charging party requested a notice of right to sue, or no jurisdiction over the charge existed. Investigated charges are resolved with a finding of "no reasonable cause" or "reasonable cause." In the reasonable cause category, the EEOC distinguishes between those with "successful conciliations," in which substantial relief has been received by the charging party, and "unsuccessful conciliations," where conciliation efforts have failed. Charges closed as unsuccessful conciliations are reviewed for litigation consideration. The EEOC considers merit resolutions to be those resolutions that result in benefits for the charging party. Charges that close via a predetermination settlement, a withdrawal with benefits, or a reasonable cause finding (either category) are considered merit resolutions.

As part of the effort to reduce the backlog, the EEOC has placed an increased emphasis on facilitating the resolution of cases prior to determination. Where the parties have reached a settlement early in the investigative process, the EEOC will accept the settlement if it provides "appropriate relief"; if the settlement is proposed prior to a determination but where it is likely that a cause finding will be issued, the EEOC will accept the settlement only if it provides for "substantial relief." This standard was set as policy at the April 1995 meeting of the EEOC commissioners.[43] Another means being used by the EEOC to produce resolutions prior to a formal cause finding is alternative dispute resolution (ADR). ADR uses mediation techniques to produce an agreement between the parties voluntarily, without the imposition of a solution from an outside third party. (See ADR discussion in section 3.3.6.)

When an investigation has produced sufficient evidence to make a determination, charges are resolved as either no reasonable cause or reasonable cause. When a charge is closed as no reasonable cause, the charging party receives a short letter notifying him or her about the finding. Prior to 1996, the notification of a no cause finding included substantive information about the finding. Following the recommendation of the Priority Charge Handling Task Force, the no cause finding letters now include only a short statement informing the charging party of the finding. More information can be sought by the charging party from the office that made the determination; the EEOC suggests that offices try to speak to the charging party by telephone when a no cause determination is made. While there are no formal procedures to appeal a no cause finding, the EEOC may reconsider a decision if the charging party presents substantial new and relevant evidence that was not previously considered and that may have affected the outcome; information on misconduct by an agency official; or a persuasive argument that the EEOC's decision was contrary to law. One criticism heard from persons interviewed outside the EEOC was that the possibility of reconsideration was not well known; the EEOC should make a better effort to inform complainants of the possibility and the standards that may allow the reconsideration of a decision.

A reasonable cause determination is issued when the investigation produces evidence that indicates that discrimination occurred. A cause finding is usually followed by efforts to reach an agreement with the respondent that produces substantial relief for the charging party. This effort is referred to as conciliation. However, not every cause finding produces a successful conciliation. When a respondent refuses to participate in any sort of settlement or to provide relief to the charging party, the EEOC must then determine whether it will litigate. Cause charges where conciliation is not achieved are closed, whether or not the EEOC later pursues litigation.

If the respondent in a cause finding on a Title VII or ADA charge that cannot be successfully conciliated is a state or local government, the EEOC will send the case to the Department of Justice, where further actions are under its jurisdiction. The EEOC has the authority to litigate charges filed under the ADEA and the EPA. In cases where a charge has been referred to the Department of Justice, it may reinvestigate the charge, make additional efforts at settlement, or choose to litigate. Some additional information on these cases can be found in the chapter on the Department of Justice.

EEOC's procedural regulations provide that it must issue a notice of right to sue if requested by the charging party 180 days after the filing of the charge. If the request is made prior to 180 days after filing the charge, the EEOC will issue the notice of right to sue only if it determines that it is probable that it will not be able to complete the administrative processing of the charge within the 180-day time period. If a right-to-sue letter is requested early in the process, before a cause determination, the investigation will likely go no further, and the case will be considered an administrative closure. Following a determination, the EEOC attempts conciliation; if its efforts are unsuccessful, it will issue a right-to-sue letter after its legal unit makes a determination not to litigate on the charge. If the EEOC decides to pursue the matter in litigation, the charging party may request a right-to-sue letter and bring a private suit against the respondent.

Table 3-3 displays the distribution of charge resolutions by statute for FY 1998. These data indicate that the majority of charge resolutions across all statutes are not merit resolutions. The percentage of all charge resolutions that closed with a reasonable cause finding was 4.6 percent. The two largest categories of closure are administrative closures and no cause closures. There is only modest variation in the percentage of such closures by statute. ADA complaints do not close administratively or with no cause findings in a proportion that is significantly different from the outcomes of charges brought under the other statutes. ADA charges do show the largest percentage of reasonable cause findings, and within that the largest percentage of successful conciliations, across all the statutes.

Those who have been following ADA charge statistics issued by the EEOC since ADA enforcement began in 1992 have expressed concern about the large percentage of no cause and administrative findings; some of the criticism appears to assume that ADA charge resolution distribution is atypical compared with the other statutes. The data from all the statutes indicate that ADA cases produce the largest percentage of merit findings (14.7 percent) compared with the other statutes. Nonetheless, it would be useful to understand why such a small proportion of all charges result in a merit resolution.

Table 3-3

Resolutions of Discrimination Charges Filed with the EEOC, FY 1998

Type of Resolution	**Total (%)**	**ADA (%)**	**Title VII-Race (%)**	**Title VII-Sex (%)**
Settlements	4.6	4.9	4.1	4.6
Withdrawals with benefits	3.2	3.5	2.3	3.6
Administrative closures	26.7	27.7	22.0	31.6
No reasonable cause	60.9	57.7	68.6	55.0
Reasonable cause	4.6	6.2	2.9	5.2
Successful conciliations	1.3	2.3	0.8	1.4
Unsuccessful conciliations	3.3	3.9	2.1	3.8
Total merit	12.4	14.7	9.3	13.4

3.3.5 Charge Statistics

All charges filed under the federal discrimination statutes enforced by the EEOC are entered in a database called the Charge Data System (CDS). Both EEOC and FEPA staff enter charges into the system, so that it contains not only the charges received at an EEOC field office but those filed through a FEPA as well. The CDS contains demographic information about the charging party; the name, industry, location, and size of the respondent; and the charge as it moves through the agency process. Complainants may file a charge that alleges more than one basis (e.g., disability and sex) and also alleges more than a single issue (e.g., discriminatory hiring, failure to reasonably accommodate). The CDS allows the entry of up to eight bases and eight issues. Dates of filing and of various actions on the charge are recorded in the CDS, as are the resolution codes.

Because an individual may state more than one basis and raise more than one issue, the database is complex. The U.S. Commission on Civil Rights report notes that the complex structure of the database makes it difficult for staff other than programmers to develop reports or special data analyses from the data. Programmers do not always have the time to produce a custom report. The relative inflexibility in data analysis of the CDS reduces the extent to which it can be used not only to track cases but also to develop agency policy and assess success.

The EEOC is aware of the limitations of its current database system. The need to upgrade its technology, particularly computer technology, is mentioned in several of the task force reports and in its budget requests.

Despite the limitations of its database system, the EEOC has done a commendable job of producing summary information about its caseload, which it has made freely available to the public on its Web site and provided to organizations upon request.

3.3.5.1 Profile of Charges

Table 3-4 and Table 3-5 provide some summary data about ADA charges received since July 26, 1992. The data in these tables come from the CDS. The data analysis that produced the tables comes from the EEOC tables on its Web site, from tables in the U.S. Commission on Civil Rights report, or from original analyses performed on the data for this report. The source of the data analysis is noted on each table.

Table 3-4 shows the number of ADA charges received for the period July 26, 1992-February 28, 1998. The totals include all charges in which coverage under ADA is claimed; some of the charges may have dual coverage (e.g., ADA and Title VII). It is worth noting that the total number displayed here is larger than the total number of ADA charges that the EEOC cites when asked about its ADA charge caseload. The reason for the difference is the inclusion of the FEPA-processed dually covered charges. Thus, while the public generally believes that approximately 108,000 ADA discrimination charges have been filed since 1992 (the number on the Web site as of 9/30/98), the true number is approximately 73 percent higher if ADA-applicable charges received by the FEPAs are also considered. The count of charges is not identical to the number of people who have filed charges, as an individual may file more than one charge. The EEOC estimates that there are, on average, 1.085 charges per person in the CDS database.[44]

The office that receives the charge is not necessarily the office that is responsible for processing it. Charges are transferred to other offices for handling based upon issues of jurisdiction and whether the FEPA is certified for ADA charge processing. The CDS indicates that the FEPAs process approximately 37 percent of the disability discrimination charges filed under ADA. Table 3-4 also displays the demographic characteristics of the charging parties for those who filed with the EEOC and those who filed at a FEPA. The differences between these distributions are small, although women and nonwhites seemed slightly more likely to file at the FEPA.

Table 3-5 shows the disabilities of ADA charging parties. The distribution has been broken down according to whether the charge was received at an office of the EEOC or at a FEPA. The categories in Table 3-5 are based upon the categories developed by the EEOC and present in the CDS. For purposes of display, some categories have been combined (e.g., leg and arm extremities have been put into a single extremities category, and various blood disorders have been combined into a single non-HIV category). Table 3-5 suggests that, overall, the disabilities of those filing through the EEOC are little different from those filing through a FEPA. However, there is a large discrepancy between the two agencies in the percentage categorized as "other disability." This discrepancy, and the large percentage of FEPA cases classified as other disability, raises a question about the how the FEPAs assess disability and whether that assessment is comparable to that performed by the EEOC. The "other" category is intended for persons whose disabilities do not neatly fit in any of the specific categories. Because those categories are fairly comprehensive, it is unclear what kinds of impairments fall into the "other" category. The percentage of cases that fall into the "other" category in FEPA-processed charges is even larger than the proportion at the EEOC. It may be that persons who file through a FEPA disproportionately have disabilities that are not neatly categorized. However, an equally likely explanation is that there are some differences in the manner in which the EEOC and the FEPA offices evaluate and classify disabilities. In both cases, the "other" category seems rather large.

The distribution shown in Table 3-5 indicates that the largest categories of disability or impairment among ADA charging parties (besides "other") are back impairments, emotional or psychiatric impairments, neurological impairments, and impairments of the extremities. These have been the major categories of complainant disabilities since ADA enforcement began. A second grouping of impairments, each accounting for approximately 3 percent of the charges, includes cancer, diabetes, hearing impairments, heart or cardiovascular disorders, substance abuse, and vision impairments. Nearly 7 percent of the EEOC-received charges are based on the third prong of ADA definition of disability, regarded as a person with a disability.

Table 3-4

Profile of ADA Charges Received by the EEOC or a FEPA

July 26, 1992-February 28, 1998

	Total Received	Received at EEOC	Received at FEPA
All ADA Charges	171,669	97,994	73,675
Percentage	100.0%	57.1%	42.9%
Sex			
Female	45.6%	44.3%	47.5%
Male	54.4	55.6	52.5
Total	100.0%	99.9%	100.0%
	(n=17,1156)	(n=97,941)	(n=73,215)
Race			
Asian/Pacific Islander	.9%	.9%	.9%
Black	17.5	18.6	15.8
American Indian/Alaskan Native	.6	.6	.7
White	65.3	69.4	58.9
Other, not specified	15.6	10.5	23.6
Total	100.0%	100.0%	99.9%
	(n=159,601)	(n=96,785)	(n=62,816)

Source: EEOC Charge Data System, analysis by authors.

Table 3-5

Type of Disability of ADA Charging Parties by Filing Agency

Type of Disability	EEOC (%)	FEPA (%)
Allergies	.64	.57
Asthma	1.55	1.37
Back impairment	15.48	9.73
Chemical sensitivities	.38	.27
Blood disorders (non-HIV)	.79	.77
HIV	1.57	1.22
Cancer	2.12	1.82
Diabetes	3.21	2.70
Disfigurement	.29	.27
Dwarfism	.04	.04
Emotional/psychiatric impairment	12.09	10.74
Extremities	8.51	9.93
Gastrointestinal impairment	.74	.85
Hearing impairment	2.57	2.77
Heart/cardiovascular impairment	3.61	3.39
Kidney impairment	.59	.47
Mental retardation	.35	.42
Neurological impairment	10.81	8.53
Respiratory/pulmonary disorder	.83	.70
Speech impairment	.52	.79
Substance abuse	2.78	2.72
Vision impairment	2.31	2.17
Other disability	18.34	31.27
Record of disability	2.04	1.26
Regarded as disabled	7.13	4.87
Relationship/association with an individual with a disability	.73	.37
Total	100.00 percent (n=109,187)	100.00 percent (n=69,360)

Source: EEOC Charge Data System, author calculation. Distributions are based on the sum of all disability bases. Complainants may list more than one disability basis in a single charge.

3.3.5.2 Charging Issues

With one exception, all the civil rights statutes enforced by the EEOC define prohibited employment discrimination to include discriminatory hiring practices, various discriminatory actions experienced by persons who are in a job, and discriminatory discharge. The statutory exception is the EPA, which only covers wage discrepancy claims. One of the persistent criticisms of ADA has been that it has not increased the employment rate of persons with disabilities. Critics have used the issues about which charging parties have complained as evidence to support this assertion. As Table 3-6 shows, approximately 92 percent of ADA charges involve issues related to having a job, such as terms of employment, harassment, promotion, or termination. Approximately 8 percent of complainants allege failure to hire. What many of ADA critics have failed to note is that over all the civil rights statutes, the proportion of complainants alleging failure to hire is below 10 percent (see Table 3-6). This had been true of discrimination charges prior to ADA. Disability discrimination charges filed with the FEPAs under state and local antidiscrimination laws have historically shown a similar pattern.[45]

Table 3-6
Charge Issues Most Often Cited, by Statute
Percentage of Total Charges for Each Statute

EEOC Charge Issues	ADA	Title VII-Race	Title VII-Sex
Hiring	7.9	7.9	4.0
Discharge	53.7	46.8	41.8
Failure to provide reasonable accommodation	32.1		
Terms of employment	14.7	24.3	20.7
Harassment	13.8	19.6	18.5
Discipline	5.9	10.7	6.7
Promotion	4.0	16.2	10.2
Wages	3.8	10.2	10.1
Layoff	3.6	3.0	3.1

EEOC Charge Issues	**ADA**	**Title VII-Race**	**Title VII-Sex**
Benefits	3.6	1.6	2.0
Rehire	3.2	.5	.5
Suspension	2.5	4.7	2.6

Source: EEOC, *National Database Automatic Reporting Facility*. FY 1997 Charge Receipts, Receiving Office—EEOC. Statute/Basis Summary by Issues, March 14, 1998. Total percentage exceeds 100 percent because charges may allege more than one issue.

3.3.5.3 Charge Resolutions

Table 3-7 displays the types of charge resolutions for ADA charges processed between July 26, 1992, and February 28, 1998, by processing agency. While the proportion of charges that are determined no reasonable cause is similar whether the charge was processed by the EEOC or by a FEPA on contract, some differences are notable. The FEPA statistics show a higher proportion of charges that close with a settlement or a withdrawal with benefits. The EEOC considers both these kinds of closures merit closures (i.e., they produce a good outcome for the charging party). The FEPAs also have a smaller percentage of administrative closures. The EEOC produces a higher rate of reasonable cause findings. Some of the differences in these resolution statistics are the result of EEOC policies that result in the transfer of cases to the EEOC where the EEOC disagrees with the FEPAs determination or where national priority issues are present. These differences may also arise from the fact that the FEPAs do not prioritize charges. Some of the predetermination settlements may come from cases that the EEOC would have put in the C category and closed quickly. However, the higher rate of predetermination merit resolutions (settlement and withdrawal with benefits) does raise the question of why the FEPAs produce a higher rate of merit resolutions for charging parties. Beyond a few speculations, EEOC staff were not able to provide a firm explanation for this.

Table 3-7

ADA Resolutions by Type for EEOC and FEPA-Processed Charges

Type of Resolution	**EEOC (%)**	**FEPA (%)**
Settlement	4.5	11.9
Withdrawal with benefits	5.7	11.1
Administrative closure	36.9	24.9
Right-to-sue letter at charging party's request	22.8	5.0
No jurisdiction	7.0	2.0
Other	7.1	17.9
No reasonable cause	49.6	50.9
Reasonable cause	3.3	1.2
Successful conciliations	1.2	1.0
Unsuccessful conciliations	2.1	.2
Total	100.0%	100.0%
	(n=93,042)	(n=49,009)

Source: EEOC, CDS. Percentages are based on cumulative charge data of closed charges received between 7/26/92 and 2/28/98. Author calculation.

3.3.5.4 Charge Processing Time

One of the persistent complaints about the enforcement of discrimination charges has been the long time that elapses between the filing and the resolution of a charge. It was the large number of cases over 180 days old (66 percent of the charge inventory in 1995) that was part of the motivation for instituting the Priority Charge Handling Procedures. Since 1995, the EEOC has dramatically decreased the number of cases in its pending inventory. An EEOC press release in January 1999 states that the pending inventory was reduced from 111,000 in 1995 to 52,000 at the end of 1998. This has been accomplished by reducing the time required to resolve charges.[46]

3.3.6 Alternative Dispute Resolution

The EEOC promotes the use of mediation as a method of alternative dispute resolution (ADR). On February 11, 1999, the EEOC launched an expanded mediation program made possible by $13 million in its FY 1999 budget earmarked by Congress for mediation.[47]

The use of mediation started at the EEOC with a pilot project in 1992. Following a task force report, the agency endorsed ADR as a key strategy for decreasing processing time and increasing case resolutions.[48] The ADR Task Force set out several principles for using ADR that include the following:

- ADR is to be voluntary for both parties to the charge.
- ADR must be fair to the charging party and the respondent in perception and reality.
- All discussions and deliberations must remain confidential, and any third parties involved must be neutral and insulated from the EEOC enforcement process.
- ADR is to be used primarily before an investigation and is to be seen as an integral part of charge processing.
- Agreements reached through ADR will be signed and enforced by the EEOC, as are settlements achieved through other means.

The EEOC feels that the use of ADR has been largely successful. It reports that since the program's inception in 1996 through FY 1999, more than 7,300 charges have been resolved through mediation with benefits of approximately $87.5 million obtained for the charging parties. During FY 1999, the first year of its expanded mediation program, 65 percent of the cases taken to mediation were successfully resolved. Data for ADA closures following ADR show that in FY 1997 there were 202 closures; in FY 1998 there were 401 closures; and in FY 1999 there were 1,026 closures that involved a settlement or withdrawal with benefits. The benefits totaled $3.7 million in FY 1997, $4.8 million in FY 1998, and $10.2 million in FY 1999. Eighty percent of the ADR ADA closures were by settlement. ADA cases constituted approximately 21.3 percent of all cases resolved through ADR (Title VII cases constituted 60.6 percent and ADEA cases were 9.2 percent).[49] ADR cases appear to settle somewhat more quickly than other cases.

The EEOC acknowledges that not all charges are appropriate for mediation and that charging parties may be more interested in mediation than respondents. In the interviews conducted by the researchers and the staff of the U.S. Commission on Civil Rights, persons inside and outside the EEOC felt that ADR was often appropriate and effective for ADA reasonable accommodation charges.[50] However, persons outside the EEOC also expressed some reservations.

A big challenge to the EEOC interest in increasing the use of mediation is getting the parties to agree to it. In FY 1999, 81 percent of charging parties offered mediation agree to try it. However, employers are much more reluctant to participate in mediation. In FY 1999, only 36 percent of employers agreed to participate in the mediation process. The EEOC believes that to change this ratio, greater education of employers about mediation must take place. It is preparing videos and brochures aimed at employers for this purpose. The effort currently required to obtain employer agreement increases the transaction cost of mediation. For mediation to be of benefit to the agency as well as the parties, these costs need to be reduced.

A second issue that arises in mediation involves the use of attorneys. An employer is more likely to already have an attorney than a complainant. In fact, the person representing the employer in the mediation may be an attorney. On the other hand, it is important that the employer's representative at the mediation have the authority to reach an agreement. Complainants are less likely to come to a mediation with counsel, although some do. The researchers were told that, in general, if the parties want their attorneys with them, that is permitted. However, an attorney from the disability community told of an instance where only the complainant came with an attorney, and the mediator at first would not permit the attorney to attend the mediation. From past experience, the EEOC believes that agreements are easier to reach when the parties mediate without counsel. It would like to see a process where neither side feels obliged to come to mediation with additional representation. EEOC staff stated that when one party in a mediation is represented and the other is not, the mediator is empowered to intervene if he or she feels the process is railroading one of the parties.

When the parties resolve a charge through mediation and sign a settlement agreement, they also sign away further legal rights on that charge. The charge will be dismissed and the charging party and the EEOC agree not to use the charge as a basis for any future legal action. The EEOC relies on the mediators to ensure that the process is fair and the result balanced. However, the EEOC does not second-guess the agreement. It does not review the agreement to assess whether the charging party came away with too much or too little. After the parties have reached a settlement, the EEOC signs the agreement to allow its enforcement.

Under the new initiative, the use of ADR will increase over the next few years. All field offices have been asked to develop a plan for implementing ADR and have been given some targets for the percentage of cases that should be recommended for ADR. In FY 1999, Congress specifically authorized $13 million to support the expansion of the mediation program. Mediations will be performed by a combination of internal mediators employed directly by the EEOC, external mediators employed on contract, and pro bono or volunteer mediators. Mediators were to be trained and experienced in mediation and in the laws enforced by the EEOC. The EEOC contracted with an outside expert to develop a participant survey for evaluating the effectiveness of the mediation program. The survey is currently being tested in several field offices and will be used by all offices during FY 2000. The EEOC hopes that this program will enable it to quickly identify any problems and resolve them. The EEOC has plans to expand its outreach and training activities related to its mediation program aimed at the public, employers, and persons protected by the laws enforced by the EEOC.[51]

The use of ADR raises several issues. Because there have still not been many ADR cases, it may be too soon to have the answers to these questions. However, the following issues identified in the pilot program require follow-up in the current mediation program:

- Are mediators able to maintain a balance of power between the parties? Do charging parties really feel free to refuse to go to mediation when it is offered or is there a subtle sense that refusal may result in little progress on the complaint?
- How often does mediation occur where one or both parties must pay the mediator? The EEOC has trained mediators across the country in the requirements of the civil rights laws. In some field offices, all the mediators are EEOC employees, some of them in special and separate mediation units. Other field offices have found outside, pro bono mediators; in some regions, mediators from outside organizations who are paid by one or both of the parties to mediation are used.
- Does mediation produce benefits for charging parties that are as large as they might have achieved from a more traditional EEOC settlement or from a reasonable cause finding and conciliation? Because mediation occurs before a determination, is the charging party more likely to settle easily because he or she does not understand how strong the case is against the respondent?
- Are potentially precedent-setting litigation vehicles getting mediated?

The Commission responds that under the current expanded mediation program (1) the parties do not pay for the mediation sessions—all expenses associated with the mediation are borne by the EEOC or the contract mediator; (2) mediators are trained in the civil rights laws and in mediation skills and techniques; and (3) during FY 1999, EEOC mediators came from three sources—EEOC employees, contract mediators, and pro bono mediators. The EEOC has trained its mediators on the requirement that they attempt to maintain a balance of power between the parties and that they should terminate a mediation session if they determine, despite their best efforts, that an imbalance of power exists and that one party is not capable of participating in the mediation session. The EEOC has also trained its coordinators and mediators that they should not pressure either party to participate in the mediation process, that the process is completely voluntary. The parties are informed orally and through written materials that the process is voluntary and that if they decide not to participate in mediation or if they participate and the charge is not resolved in mediation, the charge will be investigated just like any other charge.

Although the EEOC does not have meaningful data comparing mediation settlements with negotiated settlements and conciliations, it states that mediation produced substantial monetary ben efits for charging parties in FY 1999. Resolutions obtained through mediation resulted in $58.6 million in benefits, three times the $16.9 million obtained in FY 1998. Potentially precedent-setting litigation vehicles are not mediated. As a general rule, category A charges are not eligible for mediation. Such charges are mediated only if both the district director and the regional attorney determine that the charge will not be litigated.

ADA Mediation Standards Work Group, a national body made up of practicing mediators and representatives of media service providers and professional organizations, has developed guidance for mediators and others titled "ADA Mediation Guidelines" (see Appendix C). Approximately half of the work group's members have disabilities. The final standards, released in January 2000, contain detailed provisions categorized in four broad areas of program administration, mediation process, training, and ethics. They seek to ensure high-quality mediation services in the context of ADA disputes, much as standards of practice for family and divorce mediation provide in those specialty areas.

3.3.7 Findings and Recommendations

Finding 19: EEOC processing of ADA charges is similar to its processing of charges under Title VII (race, sex, national origin).

- ADA charges received allege approximately the same proportion of failure to hire versus termination or other employment issues as is evident for charges coming in under the other statutes.
- The distribution of ADA charge resolutions is similar to the distribution of resolutions obtained for charges under the other EEOC enforcement statutes.
- Approximately one-third of all charge processing (including ADA) is performed for the EEOC by a FEPA (state or local Fair Employment Practices Agency), with charges considered dually filed. The EEOC does not routinely include the data from FEPA charge processing in its report of charge volume, performance, or outcome. For ADA, this means that instead of approximately 108,000 charges having been filed since 1992, there have been approximately 175,000 ADA charges filed (including those dually filed with a FEPA).

- A small percentage of charges filed with the EEOC, including ADA charges, produce a finding of reasonable cause; altogether, approximately 15 percent of ADA charges close with a merit finding, while nearly 30 percent close administratively.

Recommendation 22: The EEOC should do a better job of explaining to the public and to complainants the FEPA role in charge processing.

This could also include a reevaluation of whether data from dually filed charges should be routinely reported with EEOC data and whether the EEOC needs to engage the FEPA staff more actively in its ADA update training and its implementation of measures such as priority charge processing.

Finding 20: The EEOC has initiated a number of administrative measures, applied across all statutes of enforcement, to increase the speed of its charge processing, focus its enforcement strategically, and produce resolutions through mediation.

Recommendation 23: The EEOC should offer more support, oversight, and training to the staff of the Fair Employment Practices Agencies where ADA enforcement is performed under contract.

As the EEOC methods of charge handling change, inattention to the procedures of the FEPAs may produce a widening gap in a complainant's experience of charge handling as a function of whether the charge is filed with the EEOC or a FEPA.

Recommendation 24: As the EEOC continues to expand its use of alternate dispute resolution, it should engage in a careful evaluation of how mediation is working and should adopt standards along the lines of the "ADA Mediation Guidelines" to govern mediations of ADA disputes.

Recommendation 25: The EEOC should develop a greater research and evaluation capacity, either in-house or through research contracting, as a means of providing information useful to policy development, litigation, and charge processing.

Better research is needed in the area of the outcome of charge processing and its context as an antidiscrimination enforcement strategy. Research also could compare ADA experience with what occurs for complaints under the other statutes.

3.4 Compliance Monitoring

Agencies usually perform some compliance monitoring by requiring organizations covered by a statute to write out plans or to report annual data. These plans and data are then evaluated by the enforcement agency and compared with the requirements of the statute. An assessment is made of the extent to which the covered entity appears to be operating in conformance with the law. Compliance monitoring is an activity that aims to achieve adherence to a statute *in advance* of a complaint alleging a violation.

While the overall mission of the EEOC is to "promote equal opportunity in employment by enforcing the federal civil rights employment laws through the use of administrative, judicial, educational, and technical assistance mechanisms," the EEOC has not included compliance monitoring among the techniques it uses for ADA enforcement. Some compliance monitoring occurs for Title VII, through the requirement that employers annually provide data on the demographic characteristics of their workforces. Disability is not, however, one of the characteristics subject to this monitoring. ADA prohibition on inquiries about disability contributes to the difficulty of requesting such information.

One other avenue for assessing compliance is to engage in "testing." Testing refers to the technique in which two individuals are sent to apply for housing, a job, etc., with matched characteristics or qualifications except for the characteristic that is the focus of testing. In the case of employment, testing would involve a situation in which two individuals, one with a disability and one without, but otherwise with matching job qualifications, experience, and education, apply for the same job. Their experience with the job application process—the information about job availability, follow-up contacts and inquiries, possibilities for further interview—are then compared. If the testers are well matched, differences in their experiences with an employer, especially in the initial stages of job application, can be evidence of discrimination. Although testing is conducted in the area of housing by the Department of Housing and Urban Development, it has not been conducted by the EEOC or any other federal agency for employment as a means of both measuring compliance with all the civil rights laws and preventing further discrimination. In fact, the EEOC is currently forbidden by Congress from engaging in employment testing.

Despite this prohibition, the EEOC did make a small move to support testing as a compliance strategy by issuing in May 1996 the "Enforcement Guidance on Whether 'Testers' Can File Charges and Litigate Claims of Employment Discrimination." This guidance expresses the EEOC view that persons who apply for jobs as testers (and their organizations) may subsequently file suit for any employment discrimination to which they have been subjected in the course of testing. Thus, while the EEOC, itself, is not currently engaging in any testing activities, it has provided some legal guidance that may encourage private organizations to assess EEO compliance through the use of testers.

3.4.1 Office of Federal Contract Compliance Programs

The Office of Federal Contract Compliance Programs (OFCCP) enforces nondiscrimination and affirmative action requirements placed upon federal contractors. Section 503 of the Rehabilitation Act requires that employers with federal contracts in excess of $10,000 provide equal job opportunity and affirmative action for qualified individuals with disabilities. The OFCCP, located within the Employment Standards Administration of the Department of Labor, is responsible for monitoring and enforcing employer compliance with these requirements.

Since 1981, the OFCCP and the EEOC have had a memorandum of understanding (MOU) because discrimination charges covered under Title VII can also be under the jurisdiction of the OFCCP if the employer is a covered federal contractor. The MOU addresses the overlapping jurisdiction and outlines how the two organizations will work together so there is no unnecessary duplication of effort. With the passage of ADA, the memorandum of understanding was amended to include handling of cases with dual coverage under ADA and Section 503.

For charges that may have dual coverage under ADA and Section 503, the charge is processed at the agency where it is filed. Unlike the arrangement with the FEPAs, there is no contract between the EEOC and the OFCCP and no monetary exchange associated with the processing of the cases by one agency on behalf of the other. Amendments to the Rehabilitation Act have made the definitions used in the two statutes consistent. The coverage of the two statutes is not identical, however, so a small number of persons are covered under one and not the other. For example, an employer with fewer than 15 employees is not covered under ADA but may be covered under Section 503 if there is a federal contract.

A key area of difference between the two agencies is that the OFCCP enforces a requirement for affirmative action, as well as nondiscrimination. The OFCCP pursues this aspect of its charge through compliance reviews. While companies are asked to report the race and gender profiles of their workforces as part of affirmative action under Executive Order 11246, such reporting is not used for Section 503 because there are no inquiries about disabilities. However, the OFCCP does include disability access criteria in its on-site compliance reviews. When an investigator performs a compliance review, the physical accessibility of a worksite is observed, personnel records are examined (comparisons are made between the applicants who identified a disability versus those employed who identify a disability), and an assessment is made about whether the application process or criteria would screen out someone on the basis of disability unrelated to essential job functions. Several recent cases summarized in a report from the OFCCP suggest that on-site compliance reviews have both observed and produced a remedy for discriminatory practices that were not the subject of a specific complaint from the employees affected.[52]

The OFCCP compliance reviews are a proactive measure to combat employment discrimination. Asked whether the findings from such reviews were ever shared with the EEOC as a means of assisting in the identification of pattern or practice cases or employers with especially egregious practices, staff members of the OFCCP said no. While the two agencies communicate to prevent duplication, they pursue their own investigative and resolution methodologies and their own litigation against employers.

Recommendation 26: The EEOC should develop a stronger collaboration with the OFCCP that might involve sharing information from compliance reviews or other strategies for proactive compliance or for pattern and practice enforcement.

3.5 Litigation

Litigation is an important tool for the enforcement of civil rights law. The EEOC has the authority to litigate individual complaints where a reasonable cause finding is not accompanied by a successful conciliation, and it may pursue litigation of a systemic nature after finding cause and conciliation has failed, where there are pattern or practice issues. Commissioner-initiated charges and individual charges where investigation reveals that there may be many persons affected are often the source of pattern or practice litigation. In addition to initiating its own litigation, the EEOC also participates in litigation as amicus curiae and as intervener in private lawsuits when warranted, for example, in suits that have significant policy issues.

As a result of the 1995 task force reports, the EEOC has reformulated its litigation strategy. Following the recommendations of the Charge Processing Task Force, the EEOC has separated litigation decisions from cause findings. Thus, not every charge where there is a cause finding and a conciliation failure will be considered litigation-worthy and result in EEOC-initiated litigation. Instead, the EEOC now chooses the cases it will litigate, using the goals enunciated in the National and Local Enforcement Plans and the principles articulated by the Charge Processing Task Force. The FY 1999 Annual Performance Plan also articulates a goal of expanding the identification of pattern and practice and other systemic cases through the administrative process by 10 percent and increasing by 10 percent the proportion of cases filed in court involving multiple aggrieved parties or discriminatory practices.[53]

The ultimate authority for decisions about litigation rests with the EEOC commissioners. The general counsel makes recommendations on amicus participation to the commissioners, who review the recommendations and decide whether the Commission will participate. Following the recommendations of the Charge Processing Task Force, the Commission delegated litigation authority over certain types of cases to the general counsel, who, in turn, redelegated authority to make litigation decisions in some cases to the field legal units. Cases meeting certain criteria must still be approved through the general counsel's office and in some cases by the commissioners. In the summer of 1999, the Commission requested that the Office of the General Counsel refer all ADA cases temporarily to the commissioners for litigation decisions. The Office of the General Counsel currently reviews all field legal unit recommendations on litigating ADA cases and refers them, with its own analysis and recommendation, to the commissioners to decide whether to pursue litigation. As in other areas under the EEOC's jurisdiction, the commissioners will make the determination if a case involves an evolving issue of the law where no previous position has been taken by the Commission, if the case may involve significant expenditure, or if the case is likely to generate controversy.

The development of ADA cases takes place primarily in the field offices of the EEOC through its investigative work and its cause findings. The regional attorneys refer ADA cases in which they find cause to the Office of the General Counsel. Before the summer of 1999, the general counsel made decisions about which cases to litigate, except for cases involving new ADA issues and those that were identified as potentially especially expensive or controversial, which the general counsel passed on to the commissioners for a decision. The joint task force report of March 1998 advocated that the field offices be allowed to make litigation decisions for ADA cases with the same provisos that apply to cases under the other EEOC statutes, but the Office of the General Counsel retained decision-making authority regarding potential ADA litigation under the rationale of ensuring that the same legal analysis is applied across the various sites and because new ADA issues were still emerging. Since the summer of 1999, all litigation decisions regarding ADA cases have been referred to the commissioners.

The EEOC had filed 278 lawsuits under ADA by March 31, 1998 (98 were active as of that date). Approximately 95 percent of the lawsuits brought by the EEOC have resulted in monetary or injunctive relief; the EEOC has lost only 5 percent of ADA cases resolved to date.[54] The researchers derived information concerning the issues raised in ADA cases from the March 31, 1998, issue of EEOC's "ADA Litigation Docket." With regard to this data, discussed here and shown in Table 3-8, the EEOC cautions that, although the docket is generally accurate, it was not intended to give a precise count of each issue filed in each case; thus, the numbers presented in this paragraph and in Table 3-8 should be considered merely as estimates. Table 3-8 summarizes the issues raised in EEOC's ADA litigation docket. Altogether the cases raise 611 issues, of which approximately 490 (83 percent) involve cases EEOC filed in district court and 103 (17 percent) involve cases in which the EEOC participated as amicus curiae. The distribution of issues in the docket suggests that the selection of cases is not based only upon the relative frequency with which an issue is brought to the EEOC but on other factors as well. For example, the pool of cases from which litigation is drawn is not charges filed but charges in which cause has been found and conciliation has failed. The issues in this pool are not necessarily numerically correlated with the issues raised by all charges filed. While approximately 8 percent of the charges involve hiring issues, nearly 21 percent of the issues raised in litigation are those that involve hiring procedures. Cases with issues involving job promotion and termination (approximately 60 percent of complaints) constitute 34 percent of the docket. A noticeable proportion of cases involve judicial estoppel and eligibility under ADA, an area in which there has been unexpected difficulty in the interpretation of the law. In these areas, the EEOC has participated primarily as amicus curiae. Several of the cases listed in the Table 3-8 docket have since been heard and decided by the Supreme Court (in May and June 1999). *Cleveland v. Policy Management Systems Corp.*[55] involved the issue of judicial estoppel with regard to ADA suits brought by individuals who had asserted inability to work in applying for disability benefits. *Sutton v. United Airlines,*[56] *Murphy v. United Parcel Service,*[57] and *Albertsons, Inc. v. Kirkingburg*[58] focused primarily on whether the existence of disability should be determined with or without corrective measures (such as eyeglasses or blood pressure medication). The Supreme Court's rulings in these cases are described in subsequent sections of this report.

Both the Charge Processing and Joint Task Force reports advocate that the EEOC not be obliged to litigate every unconciliated cause finding but view its litigation docket as supporting "strategic enforcement." The Joint Task Force report recommends, as well, that there be more emphasis on commissioner-initiated charges and on case development in support of the national and local enforcement goals.

The EEOC had identified the definition of disability and hiring issues as litigation priorities. With the decisions of the Supreme Court in the *Sutton, Murphy,* and *Kirkingburg* cases, the EEOC will need to reconsider its litigation involvement with regard to the definition of disability, although many issues remain unresolved and the full implications of the more favorable decision in *Bragdon v. Abbott*[59] have not yet been charted.

Other areas of emphasis for litigation and amicus participation include cases involving what is a reasonable accommodation, harassment based on disability, caps in employee benefits that involve disabilities, and postemployment long-term disability benefits.

In interviews, attorneys and others outside the EEOC generally expressed satisfaction with the EEOC selection of cases to litigate. There were recommendations for the EEOC to pursue more ADA class action suits, not only suits with individual complainants. It was felt that greater impact might be achieved by taking on the pervasive practices of large companies. Strengths and weaknesses of the EEOC's policy positions and priorities, including some of its litigation priorities, are discussed in section 3.9.

Table 3-8
EEOC Litigation Docket by Issue
(July 26, 1992-March 31, 1998)

Issue	Total Issues	Status		Docket		
		Active	Resolved	Trial	Appellate	Amicus
Job promotion and termination	209	64	145	183	5	20
Hiring procedures	127	47	80	118	3	6
Reasonable accommodation, accessibility, and assistive devices	121	40	81	94	4	23
Judicial estoppel and eligibility under ADA	48	15	33	3	1	44
Disability benefits	34	11	23	16	1	7
Hostile work environment	31	13	18	26	3	2
Confidentiality	18	1	17	18	-	-
Limiting, segregating, and/or classifying	10	1	9	10	-	-
EEOC notices and documentation	9	3	6	8	-	1
Association (with disabled person)	4	2	2	4	-	-
Total	611	197	414	490	17	103

Source: EEOC, *Docket of Active and Resolved EEOC Litigation*, as of March 31, 1998, at www.eeoc.gov/docs/ada.pdf. The numbers cited should be considered estimates rather than an exact count. Since a single case may raise more than one issue, the total number of issues in the docket exceeds the total number of cases.

3.5.1 Findings and Recommendations

Finding 21: Decisions about litigation priorities have been made at EEOC headquarters in the Office of the General Counsel or by the EEOC commissioners. Currently, the commissioners are responsible for making decisions on whether or not

the EEOC will litigate ADA cases; these decisions have predominantly favored cases having individual plaintiffs in lieu of class action suits.

In its response to a review draft of this document, the EEOC disputed any implication that it prefers individual cases over cases involving numbers of employees or job applicants and stated that ADA cases litigated are simply reflective of the type of cases available in the pool of cases with cause findings that have failed conciliation. The National Council on Disability does not intend for this finding to cast doubts on or to second-guess the commissioners' decision making based on the potential cases that have come before them; the point of the finding is simply that relatively few class cases are being brought by the EEOC. In fact, the EEOC's litigation of class action cases has grown in recent years, from 8 percent of ADA lawsuits it filed in 1996, to 17 percent in 1997 and 1998, and 22 percent in 1999.[60] As Recommendation 27 indicates, NCD supports the EEOC's efforts to continue to increase the proportion of class actions it litigates.

Recommendation 27: The EEOC should litigate more class action suits in appropriate circumstances for the enforcement of ADA.

The Commission expressed its agreement with the recommendation to bring more class cases. The Office of the General Counsel and the Office of Field Programs have taken steps to develop more class cases that can be brought to litigation. For example, the Office of the General Counsel developed and conducted a week-long seminar in September 1999 to train more than 90 field investigators and attorneys on how to investigate, develop, and litigate class cases. The Office of the General Counsel has indicated that, depending on budgetary constraints, several iterations of this seminar are planned for the near future.

Finding 22: The processes of investigating, developing, and selecting cases to recommend for litigation and the actual litigation of cases have been primarily the responsibility of the individual district offices of the EEOC, with little collaboration or communication between the district offices.

The "generalist" approach of the EEOC, in which enforcement personnel are expected to handle matters arising under any of the civil rights statutes under the EEOC's jurisdiction, was noted at the outset in this report.[61] This approach is manifested throughout the process of investigating charges, developing cases, and recommending cases for agency litigation; investigators generally do not specialize in any particular type of civil rights violation,[62] and the same is typically true of attorneys in the field offices. The activities of handling charges and identifying potential litigation are highly decentralized, occurring in the individual field offices of the EEOC.[63] Generalism and decentralization appear to afford local and regional insight into issues, integration of ADA charges into the general pattern and culture of the EEOC's overall operations, and inducements to enforcement personnel to gain familiarity with individuals with disabilities, disability discrimination, and the requirements of ADA. At the same time, however, these approaches engender isolation and lack of consistency in the handling of cases, necessitate handling of ADA claims by individuals who may have little expertise, and require "reinventing the wheel" each time field office personnel face an ADA issue they have not previously encountered. These approaches also result in piecemeal handling of geographically widespread and recurring discriminatory practices of an employer or industry and precipitate the haphazard pursuit of individual lawsuits instead of more deliberate, strategically calculated legal actions.

The Commission's response is that it has instituted numerous initiatives to enhance a team approach among field offices, including (1) regional meetings of regional attorneys; (2) monthly regional attorney conference calls to discuss litigation strategies and successes; (3) the assignment of headquarters liaison attorneys to each field legal unit—the liaison attorneys not only discuss difficult cases with the field attorneys but also often refer them to other offices and attorneys who have been working on similar cases or with similar issues; and (4) regular visits by assistant general counsels from Appellate Services to field offices to discuss novel issues and new developments in the law. The Office of the General Counsel constituted a task force to review all ADA cases in active litigation in the wake of the Supreme Court's ADA decisions to develop consistent theories of coverage and strategies on developing evidence to support those theories. The Office of the General Counsel has also developed a computerized bank of significant district court and appellate briefs as a resource tool for field personnel and distributes to the field offices on a regular basis material concerning ADA cases and issues: ADA Litigation Docket, a weekly list of all cases filed and resolved, a monthly list of all active lawsuits, and a monthly list of all district court decisions and significant settlements.

Recommendation 28: The EEOC should continue and enhance its initiatives to attain a team approach on appropriate categories of ADA cases; teams of investigators and attorneys with particular expertise should be assembled across field offices and EEOC headquarters to pool resources and knowledge by conducting cross-office and cross-cutting investigations and litigation.

Cases should be referred to a relevant team at whatever stage in the handling of a charge it becomes apparent that a particular charge could benefit from team expertise.

3.6 Training Activities

Since the passage of ADA, the EEOC has developed and offered training to its own staff, attorneys, the judiciary, other federal agencies, and members of the disability community.

3.6.1 EEOC Staff Training

The first ADA training activities began in 1990 and focused on headquarters staff of the EEOC. Since then, the EEOC, through its headquarters staff, has offered training across the country. This training, usually in the form of a one-to-two-day intensive workshop or by video, has been presented to field office managers, supervisors, investigators, and attorneys. Some training has also been offered the FEPA staffs. Additional training has been provided to individual field offices in response to specific requests. Some of the field offices have initiated their own training programs.[64] In some offices, experienced field office staff with a strong interest in ADA have provided in-service training to other investigators and attorneys, and in some instances they have extended this training to the staffs of the FEPAs in their area.

In every year since 1992, the EEOC has provided training on ADA to some of its staff at headquarters and in the field offices, although not all employees have received the same level or intensity of training. Some employees may have received some training on ADA only once, while others have been provided both initial training and more advanced training or training focused on a guidance or other aspect of ADA that presents a complex issue. In FY 1997, the EEOC committed $1.6 million to training overall; the proportion of such training related to ADA is not separately identified.[65]

In its interviews with EEOC field office staff about the adequacy of their ADA training, the U.S. Commission on Civil Rights found that many people in the field offices believe the training they have received on ADA has been very good. Staff at headquarters and the field offices expressed the view that investigators and attorneys in the field had been better prepared for ADA enforcement than they had been for other statutes. Nonetheless, many also expressed the view that more training was needed because of the complexity of ADA and the new issues it raises, such as reasonable accommodation, substantially limited, essential function, and undue hardship. The need for continued training was also based on the view that as the case law develops and as investigators begin to see the broad range of situations that form the basis of charges, issues not previously recognized as important for training will be identified.[66]

The Joint Task Force report states that the EEOC's training needs far exceed its resources. While the increase in the FY 1999 budget does not include money targeted for training, the increased staff and programming that will be funded by the increase will also add to the need for staff training. The EEOC has made specific plans for training its new investigators that include one day (out of four) devoted exclusively to ADA. Another round of two-day training sessions for existing staff is also planned. The focus of this training will be employers' defenses, among them direct threat and undue hardship. Approximately one of the two days is expected to be devoted to ADA. How much of this training will occur in FY 1999 and how much will be postponed to FY 2000 is not currently known.

One issue regarding training is the extent of training of the FEPA staff. In its 1999 Annual Performance Plan, the EEOC identifies as a goal the provision of training to 30 Fair Employment Practice Agencies to improve charge investigative capabilities. This goal is not specific to ADA investigations, but it does raise the issue of whether the FEPAs, which handle approximately 35 percent of ADA charges, have received training that is at a minimum equivalent to that received by the EEOC field staff. To date, it appears that the FEPA staff may be invited and sometimes do participate in training when it occurs in a nearby regional or field office. However, attendance by the FEPA staff at such training events is not mandated by the EEOC.

A second issue is whether several days of training for an investigator is sufficient, especially in light of the new and complex investigative issues posed by ADA. Some persons outside the EEOC expressed concern about the ability of investigators to perform the sophisticated analysis required by some ADA charges.

3.6.2 Attorney, Judicial, and Other Federal Agency Training

In addition to training its own attorneys about ADA, the EEOC, through the Office of Legal Counsel, has been involved in offering, coordinating, facilitating, or reviewing training for other federal attorneys and for the federal judiciary. There have been several training activities that involve attorneys at the Department of Justice. Other federal agencies where there has been training of attorneys or other federal staff include the Departments of Labor, Education, Health and Human Services, and State. Presentations have also been made to such offices as the Federal Emergency Management Agency, the President's Committee on the Employment of People with Disabilities, the U.S. Customs Agency, and the U.S. Army Reserve.[67]

Some training of the federal judiciary has also occurred through presentations made by EEOC staff at the National Judicial College and other forums. A persistent complaint on the part of the private disability lawyers and disability advocates is that many of the federal judges do not understand disability issues, have not been able to place disability within a civil rights paradigm, and are insufficiently versed in the provisions of ADA. Persons both inside and outside the EEOC agreed that a more proactive program of ADA training for federal judges is needed.

3.6.3 Findings and Recommendations

Finding 23: The EEOC promptly initiated ADA training of its staff and ADA consumers. It has continued to update staff training as ADA matures.

Recommendation 29: The EEOC should follow up ADA Supreme Court decisions with guidance and training for its field staff and for stakeholders on what the decisions mean for the enforcement of ADA.

Recommendation 30: The EEOC should initiate another round of consumer training about Title I to update the information of persons who may have been trained at an earlier point and to increase the cadre of persons who can themselves disseminate the training.

Recommendation 31: The EEOC should work to improve the understanding of disability issues and of ADA through increased training of the federal judiciary.

3.7 Technical Assistance

The EEOC has been engaged in providing technical assistance on ADA since before Title I went into effect in 1992. As required in the law, it participated in the development of the initial ADA technical assistance plan, in collaboration with the Department of Justice. The focus of EEOC technical assistance has been employers, interested individuals and organizations, and people with disabilities. However, it appears that, on balance, more technical assistance has been delivered to employers than to employees or potential employees.

Technical assistance offered by the EEOC has included

- short brochures on Title I in question-and-answer format
- a detailed technical assistance manual
- public presentations to employers, human resource personnel, legal professionals, medical groups, and disability organizations
- seminars and training sessions offered to staff in other federal agencies

- Technical Assistance Program Seminars (TAPS), primarily attended by human resource specialists and managers
- videotapes, audiotapes, and public service announcements about Title I
- train-the-trainers courses jointly sponsored with the Department of Justice
- an ADA speakers bureau that provides speakers from headquarters and the field offices on request
- a special ADA helpline as part of its toll-free telephone assistance line

Some of the funding for the training seminars, especially those labeled TAPS, has come from a source called the Revolving Fund. The Revolving Fund was set up in 1992 by special legislation in response to a request from the EEOC. This legislation—the Education, Technical Assistance, and Training Revolving Fund Act of 1992—allocated $1 million to the EEOC to be put in a fund for technical assistance education. These funds are replenished by charging a fee to the participants in the EEOC technical assistance program seminars. Most of the participants in these seminars are from the business community or other federal agencies. The EEOC acknowledges that people in the disability community and small businesses may find the fee prohibitive. Half-day seminars at a reduced cost and other low-cost or free outreach activities are one way that the EEOC is trying to respond to this criticism. Some of the field offices have offered their own training at no cost, some of it aimed at small businesses and people with disabilities.

The technical assistance efforts of the EEOC have been augmented by the network of Disability and Business Technical Assistance Centers (DBTACs), set up and funded through the National Institute for Disability and Rehabilitation Research. These centers have been a key distribution point for a great deal of Title I technical assistance information, including that developed by the EEOC. However, there is no formal coordination between the DBTACs and the EEOC with respect to a strategy for Title I technical assistance (a more detailed discussion of the DBTAC role in technical assistance is presented in Chapter 7).

The EEOC has had a Web site since February 1997. Although it was slow to create a Web site, the EEOC is now using its site to provide a great deal of information to the public about its activities, its plans, and its record of charge processing. The four task force reports are all available on the Web, as well as the strategic plan, regulations, and various other documents. There is information about the laws enforced by the EEOC and the procedures to follow to file a charge. More information is available on the Web site about ADA than about the other statutes, a fact that has both advantages and disadvantages. ADA information includes the litigation docket and the charge statistics for fiscal years 1992-1998, broken down by total number of charges, type of issue, type of disability, and type of closing. The richness of ADA information on the Web site makes information about EEOC's ADA enforcement activities easily accessible. The disadvantage of this admirable openness is that comparable information is not provided about EEOC processing under the other statutes. Thus, there is no context for assessing whether ADA charges and their outcomes are unique or are comparable to what occurs with the other civil rights laws. A second caveat, which is not explained clearly on the Web page, is that the charge data are only from the charges filed directly with the EEOC. Because the dually filed FEPA charges are not included, the total number of ADA charges is underreported. These issues aside, the EEOC is to be commended for making so much information publicly available.

While some of the technical assistance information made available by the EEOC has probably reached people living in rural areas or who are from diverse cultural backgrounds, it appears that the EEOC technical assistance efforts have not sufficiently targeted these groups. The field offices have articulated a priority to reach out to underserved populations in their Local Enforcement Plans. However, the U.S. Commission on Civil Rights report on Title I documents the inadequate outreach to rural and culturally diverse populations.[68] Title I information may have been targeted on these communities as part of the efforts of the DBTACs and the President's Committee on the Employment of People with Disabilities. The 1999 priorities of the EEOC do focus on outreach to underserved communities of persons from diverse cultural backgrounds; it was an explicit topic of discussion at a January 1999 meeting that Chairwoman Castro held with representatives of civil rights groups. For FY

2000, the EEOC has identified issues of multiple discrimination as a major outreach, educational, and enforcement priority, including cultural diversity and disability issues. Whether this includes a focus on rural populations and youth with disabilities who are preparing to enter the labor force is less clear.

3.7.1 Findings and Recommendations

Finding 24: The EEOC has provided technical assistance in the form of training, speakers, and written materials to other federal agencies and to employers. It has reached members of the disability community to a lesser extent and has not targeted specific groups such as persons from diverse cultural backgrounds, rural residents, or youth with disabilities.

Recommendation 32: The EEOC should engage in increased outreach to the disability community. This outreach should involve a special effort to reach persons from diverse cultural backgrounds, rural residents, and youth with disabilities who are ready to move into employment.

Such outreach should include additional efforts to educate people about their rights under ADA and efforts to use the experiences and expertise of people with disabilities to identify issues for policy development and strategic litigation.

3.8 Media Contact

The EEOC has made some effort to respond to incorrect press reports of ADA employment cases. One way this has occurred is through letters to the editor. Publicity about important cases is another avenue. EEOC staff expressed the view that as an enforcement agency, the EEOC could not take too strong an advocacy position in the media without seeming to "take sides." However, several persons outside the EEOC expressed the view that the EEOC could and should be engaged in more proactive work with the media around ADA. It was observed that the negative press gets a lot of attention, and this may undermine voluntary compliance with ADA. A second issue involves the negative publicity that focuses on the diagnostic categories of ADA complainants. The EEOC could take a stronger role in confronting the confusion around this aspect of disability definition. It is not only a problem for legal definition, it is also strongly related to public support for ADA. A more detailed discussion of the media coverage of ADA and some examples of the negative and inaccurate information it contains is presented in Chapter 9.

3.8.1 Findings and Recommendations

Finding 25: The EEOC has not taken a sufficiently active role in responding to negative and inaccurate media and other public comments about ADA.

- The EEOC has made some efforts to issue written or other responses to negative and inaccurate media reports about ADA.
- Advocates and agency staff both agree that the EEOC ought to be taking a more proactive stance in explaining ADA and in countering the inaccurate negative media reports.
- The definition of disability is an issue that has been the focus of much negative publicity that the EEOC has not addressed vigorously with the media.

Recommendation 33: The EEOC should devote greater attention and more resources to actively explaining ADA to the public in a positive manner.

This effort should include countering, where appropriate, incorrect or inappropriately negative presentations or statements about ADA in the media. In its relationships with the media, the EEOC should take a clearer and stronger position in relation to the definition of disability and judicial precedents interpreting it, consistent with the recommendations presented in section 3.9.3, both as a matter of legal principle and as a key factor affecting public understanding of and support for ADA.

3.9 Policy Positions and Leadership

Previous sections discuss the processes and mechanisms by which the EEOC takes positions on policy matters arising under Title I of ADA. These include, in particular, setting policy by issuing regulations and regulatory guidance (discussed in section 2.2) and by the selection and implementation of litigation priorities (discussed in section 2.5). This section examines the substantive content of EEOC policy decisions and the leadership the agency has shown in promoting effective and vigorous implementation of the requirements of ADA.

3.9.1 Accomplishments

In a number of instances, the EEOC has furthered the goal of effective and enlightened implementation of ADA by taking strong, timely, and appropriate stances on issues, sometimes controversial ones. Some such positions were taken at the time the EEOC issued ADA Title I regulation in July 1991. Others have been taken in subregulatory guidances, in litigation, and in other ways subsequent to the issuance of the Title I regulation.

The EEOC took a strong stance on the issue of mitigating measures (unfortunately, one that was eventually rejected by the Supreme Court in *Sutton v. United Airlines,*[69] *Murphy v. United Parcel Service,*[70] and *Albertsons, Inc. v. Kirkingburg*[71]) by providing in the interpretive guidance for its Title I regulation that whether an impairment exists or substantially limits a major life activity should be determined without regard to mitigating measures such as medicines or assistive or prosthetic devices.[72] The EEOC reiterated its stance on mitigating measures in its March 15, 1995, guidance memorandum on the definition of disability.[73] The Commission consistently sought to advance its position in litigation, filing numerous lawsuits that advanced that position and participating as amicus curiae in a number of lawsuits in various judicial circuits to argue the EEOC position on the issue. The Commission followed a persistent strategy to ensure that its position on the mitigating measures issue was adopted by the courts.

The guidance memorandum on the definition of disability included some other noteworthy forward-looking positions. The EEOC included an example of a person with genetic predisposition to disease or disability in the "regarded as" prong of the definition of disability.[74] This is an emerging issue area, and the EEOC showed considerable leadership in taking the position it did when discussions were still at an early, formative stage. Among other significant policy stances in the memorandum, the EEOC took the following positions for the first time:

- Voluntariness does not affect whether a condition is an impairment (we give an example of someone who acquires lung cancer as a result of smoking) (p. 902-14).
- Major life activities include mental and emotional processes such as thinking, concentrating, and interacting with others (p. 902-15).
- HIV is inherently substantially limiting and thus constitutes a disability (p. 902-21). [The Supreme Court cited this discussion of HIV in the *Bragdon v. Abbott* decision.]

An excellent example of the EEOC's taking initiative in formulating sound ADA policy is its Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, issued in March 1997. This document was groundbreaking in many respects. It provided much-needed guidance to employers regarding their obligations to employees and applicants with psychiatric conditions. It clarified the types of job accommodations that might be necessary for employees with psychiatric disabilities; among these, it recognized that the employer might in some cases be required to permit an attendant or job coach to be present on a job site—a type of reasonable accommodation that had not to that time been explicitly recognized. It made clear that the concept of "major life activity" should not be interpreted in an overly medical fashion, by recognizing the role of input and evidence from nonmedical personnel in making determinations regarding the impact of impairments on activities. It also recognized that standards of conduct imposed by employers must be job-related and consistent with business necessity or they may not be used to exclude or disadvantage employees with disabilities; this was an important clarification by the EEOC, although the agency complicated the matter somewhat by choosing an ill-advised example of dress and appearance requirements applied to a disheveled warehouse worker. The guidance also took the following additional important policy position for the first time:

- The Commission declared that sleeping is a major life activity (p. 5).
- The Commission explained when "novel" major life activities such as sleeping, concentrating, and interacting with others are (and are not) substantially limited (pp. 10-12).

- The Commission stated that questions about mental illness are not permitted on job applications (p. 13).
- The "job-related and consistent with business necessity" standard for employee inquiries and exams was defined as a "reasonable belief, based on objective evidence" that an employee's ability to perform essential functions would be impaired or that she or he would pose a direct threat (p. 15).
- The Commission declared that physical changes to the workplace, changes in workplace policies, and changes in supervisory methods are all forms of reasonable accommodation (pp. 25-27).[75]
- The Commission stated that a person who takes medication that may cause side effects does not, for that reason alone, pose a direct threat (p. 34).

An outstanding instance of EEOC leadership with regard to a particularly volatile issue under ADA were its efforts in relation to two lines of court decisions. Some courts had ruled that employees' disclosures in their applications for disability benefits rendered them not "qualified" and thus, through what is referred to as "judicial estoppel," precluded them from maintaining ADA actions. In the second group of decisions, some courts reasoned that ADA and the Rehabilitation Act only protect "employees" from discrimination, and that persons not currently working for the employer could not sue, even if their claims involved discrimination with regard to disability or retirement benefits that, by definition, were only available to former employees.

With regard to the judicial estoppel issue, the EEOC played a forceful and positive role in challenging the estoppel/preclusion approach. On February 12, 1997, the EEOC issued Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person Is a "Qualified Individual with a Disability" Under the Americans with Disabilities Act of 1990 (ADA).[76] The Introduction to the Executive Summary of the document indicated that it "explains why representations about the ability to work made in the course of applying for social security, workers compensation, disability insurance, and other disability benefits do not bar the filing of an ADA charge."[77] The enforcement guidance was an extensive document that analyzed the differences between

ADA's purposes and standards and those of other statutory schemes, disability benefits programs, and contracts; discussed court decisions that addressed this issue; and explained how to assess what weight, if any, to give to such representations in determining whether an individual is a "qualified individual with a disability" for purposes of ADA.[78]

The guidance discussed the particular standards and purposes of ADA, the Social Security Act, workers compensation, and disability insurance plans.[79] Among its conclusions, the EEOC found the following:

- ADA's Purposes and Standards Are Fundamentally Different from the Purposes and Standards of Other Statutory Schemes and Contractual Rights.[80]
- ADA Definition of "Qualified Individual with a Disability" Always Requires an Individualized Assessment of the Particular Individual and the Particular Position; Other Definitions Permit Generalized Inquiries and Presumptions.[81]
- ADA Definition of "Qualified Individual with a Disability Requires Consideration of Reasonable Accommodation; Other Definitions Do Not Consider Whether an Individual Can Work with Reasonable Accommodation.[82]
- Because of the Fundamental Differences Between ADA and Other Statutory and Contractual Disability Benefits Programs, Representations Made in Connection with an Application for Benefits May Be Relevant to—but Are Never Determinative of—Whether a Person Is a "Qualified Individual with a Disability."[83]
- Representations Made in Connection with an Application for Disability Benefits Are Not Determinative of Whether a Person Is a "Qualified Individual with a Disability."[84]
- A Determination of What, if Any, Weight to Give to Representations Made in Support of Applications for Disability Benefits Depends on the Context and Timing of the Representations.[85]
- Public Policy Supports the Conclusion that Representations Made in Connection with an Application for Disability Benefits Are Never an Absolute Bar to an ADA Claim.[86]
- Permitting Individuals to Go Forward with Their ADA Claims Is Critical to ADA's Goal of Eradicating Discrimination Against Individuals with Disabilities.[87]

- Individuals Should Not Have to Choose Between Applying for Disability Benefits and Vindicating Their Rights Under ADA.[88]

The EEOC concluded that neither judicial estoppel nor summary judgment was appropriate in such cases.[89] The EEOC also appeared as amicus curiae in lawsuits to advocate for its views on the judicial estoppel issue, making such arguments as that court decisions applying judicial estoppel were stretching the doctrine and ignoring the legislative purposes of antidiscrimination underlying ADA, and that plaintiffs' representations of total disability were "after-acquired evidence" that should be relevant only as a defense not to the question of whether plaintiffs had made a prima facie case.[90] In addition to these vigorous efforts of its own, the EEOC also reached out to the Department of Justice and the Social Security Administration, and cooperated with those agencies in devising joint strategies for opposing the judicial estoppel lines of cases.

The EEOC also appeared as amicus curiae[91] or as plaintiff[92] in several of the leading cases addressing the rights of former employees to bring ADA suits. It argued that such rulings undermine ADA's express prohibition against discrimination in fringe benefits,[93] that former employees occupy the "employment position" of "benefit recipient" and can be "qualified" for that position even though unable to perform their former jobs,[94] that status as a former employee is sufficient to confer authority to sue for wrongs occurring in the employment context,[95] that ADA language of "employment position" in defining "qualified individual with a disability" is broader than the Rehabilitation Act reference to "job,"[96] that there are prior precedents permitting ADA actions challenging health and disability insurance limitations by plaintiffs who were qualified for the benefit but not able to work,[97] that "qualified" in the context of benefits means qualified to meet the requirements of the plan,[98] and that interpretations of the term "employee" under Title VII of the Civil Rights Act of 1964 allowing former employees to bring suit should apply to the use of the same terms under ADA.[99]

The position advocated by the EEOC on the judicial estoppel issue ultimately prevailed to a considerable degree when the United States Supreme Court ruled, in *Cleveland* *v. Policy Management Systems Corp.*,[100] that claims for Social Security Disability Insurance (SSDI) benefits and for damages under ADA were not in inherent conflict and that plaintiffs should be given the opportunity to explain apparent discrepancies between statements made in pursuing disability benefits and in their ADA claims.

The interim Enforcement Guidance on Preemployment Disability-Related Inquiries and Medical Examinations, issued on May 19, 1994, and the final guidance, issued in October 1995, broke new ground in clarifying the restrictions on preemployment inquiries and medical examinations, an issue that is unique to ADA. Among the matters of first impression in the guidance were the following:

- the definition of "disability-related" ("likely to elicit information about a disability") (p. 4);
- the circumstances under which preoffer questions about reasonable accommodation are permissible (pp. 6-7);
- the prohibition against preoffer questions about workers compensation history (p. 10); and
- the factors for determining when an examination is medical; and the application of these factors to psychological exams (p. 14).

For the most part, and with some specific exceptions noted in the section that follows, the EEOC has taken sound policy positions in most of its litigation activities. As the following section makes clear, the policy stances and legal analysis the EEOC has advanced in its regulatory and guidance documents have unfortunately often not been as enlightened or as effectively championed as the positions the agency has taken in litigation.

The EEOC has demonstrated considerable leadership, sensitivity, and initiative in the style in which it has delivered its subregulatory guidance. For the most part, the EEOC has issued enforcement guidance documents that are user-friendly. The guidances are generally not too technical and are easily readable by laypersons; they contain numerous concrete examples to illustrate the principles discussed. The accessible style of EEOC's enforcement guidances provides an excellent model for all ADA guidance documents.

3.9.2 Shortcomings

Despite the various examples, described in the prior section, of laudable efforts by the EEOC to ensure effective implementation of requirements of ADA, in other instances the agency has fallen short in the content of its policy positions or in the zeal and foresight with which it has pursued them. At times, these lapses appear to have stemmed from a lack of doctrinal clarity and analytical insight on the part of the EEOC; at other times, they appear to result from insufficient commitment to providing the dynamic leadership required to ensure comprehensive and robust achievement of the purposes that prompted Congress to enact ADA.

A critical and illustrative example of the EEOC's inadequate performance of some of its policy-setting responsibilities involves the definition of the term "individual with a disability." Despite repeated congressional statements about its intent to provide "comprehensive" protection against discrimination on the basis of disability, the EEOC has repeatedly taken unnecessarily restrictive positions on the definition and erected a number of obstructions that have impeded persons who seek to claim the protection of ADA. Such constricted interpretations of "individual with a disability" surfaced in the original ADA Title I regulation the EEOC issued in 1991 and have continued to arise periodically in subsequent EEOC policy documents.

One way in which the EEOC took an unnecessarily inhibiting stance in the Title I regulation was its adoption of a position that in order to be "substantially limited" in the major life activity of working, individuals alleging discrimination have to show that they are significantly restricted in ability to perform either "a class of jobs or a broad range of jobs in various classes."[101] Moreover, the EEOC added a statement that "[the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."[102] The class-of-jobs-or-broad-range-of-jobs and the single-particular-job-is-not-sufficient criteria are not found in the statutory language of ADA, and yet they were incorporated into ADA Title I analysis by the EEOC. In its regulatory guidance, the EEOC supported these standards by citing dubious judicial precedents,[103] while ignoring other judicial precedents, explicitly mentioned in ADA committee reports, to the contrary.[104] Some legal commentators have been strongly critical of this position of the EEOC.[105]

In its response to a review draft of this document, EEOC contended that its class-of-jobs-or-broad-range-of-jobs analysis was in fact based on substantial Rehabilitation Act case law and insisted that it is not accurate to state that the EEOC developed the criteria. The National Council on Disability, however, believes that the precedents did not compel the result EEOC arrived at and that EEOC's analysis was derived from a selective and partial marshaling of the case law.

Whether such a standard was or was not appropriate under the first (actual disability) prong of the definition, neither the EEOC Title I regulation nor the regulatory guidance declare that being denied or terminated from a single job because of a physical or mental impairment would be sufficient to constitute being "regarded as" having a disability under the third prong of the definition. The regulatory guidance suggests only that complainants can satisfy the "regarded as" prong of the definition if they can prove that an employer rejected them from a job because of "myths, fears, and stereotypes" about disabilities. This requires complainants to prove what was going on in the mind of the employer, a difficult evidentiary burden. To ameliorate the concerns of disability rights advocates who had argued that the EEOC's proposed regulation regarding the phrase "substantially limited in working" unduly limited coverage and presented potential plaintiffs with onerous burdens of evidence and proof,[106] the EEOC revised its interpretive guidance to expressly assert the contrary. The final interpretive guidance states that standards regarding numbers and types of jobs that are limited "are not intended to require an onerous evidentiary showing."[107] They are meant to require only evidence of "general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., 'few,' 'many,' 'most') from which an individual would be excluded . . . ."[108]

Despite these conciliatory platitudes, the fact is that the regulatory framework left persons alleging that they had been subjected to discrimination with highly onerous burdens of proof. It would have been relatively simple, and fully consistent with ADA's intent to provide a comprehensive remedy for discrimination, for the EEOC to have declared that whenever complainants show that employers have taken adverse actions against them based on the employees' physical or mental conditions, a presumption is created that the employer regarded the person as having an impairment that substantially limits a major life activity. The illogic of permitting employers to terminate a person from a job because of a physical or mental condition and then to argue that the condition is not serious enough to constitute a disability is starkly apparent.

In issuing its March 1995 guidance memorandum on the definition of disability,[109] the EEOC tried again to soften the blow, as it were, by stressing the "myths, fears, and stereotypes" route for proving that an employer regarded an individual as having a substantially limiting impairment and by providing a number of concrete examples of the application of the "regarded as" prong of the definition of disability. This discussion, however, was still tied to proof that the employer regarded the complainant as substantially limited to perform a class of jobs or a broad range of jobs; it engendered a highly convoluted and confusing discussion of proof issues in relation to the "regarded as" prong; and in the end it still left complainants with the burden of proving what was in the employer's mind when it took an adverse action toward them.

Thus, the EEOC went out of its way in its regulatory language to establish a strong standard that restricted access to ADA protection under the first prong; but was hazy, convoluted, and ineffective, at best, in clarifying the application of the third prong to those who had been subjected to substantially disadvantageous treatment by employers based on their physical or mental impairments. The EEOC's creation of explicit and stringent standards protecting employers alleged to have discriminated, while leaving ambiguous and indefinite the standards and analysis that might provide protection for job applicants and employees who have been subjected to discriminatory treatment, was highly unfortunate and, sadly, is not an isolated occurrence.

When the EEOC first articulated its class-of-jobs-or-broad-range-of-jobs and single-particular-job-is-not-sufficient criteria, the judicial precedents supporting them were few and wobbly, and there were counterprecedents. With the EEOC's regulatory endorsement of the restrictive criteria, judicial adoption of such analysis soon became predominant under the first (actual disability) prong of the definition. More ominously, the EEOC's strong stance on the first prong, coupled with its feeble and nebulous position under the third (regarded as) prong of the definition, facilitated the extension of the restrictive interpretation to the third prong as well, and a number of courts so held, although there were some substantial judicial precedents to the contrary.

The absence of solid EEOC pronouncements and informed analysis of the "regarded as" prong contributed to the outcome in decisions of the Supreme Court in *Sutton v. United Airlines,*[110] *Murphy v. United Parcel Service,*[111] and *Albertsons, Inc. v. Kirkingburg.*[112] Although in a narrow sense these rulings focused primarily on whether the existence of disability should be determined without corrective measures (such as eyeglasses or blood pressure medication), their language and implications as to the "regarded as" prong appear to be much broader and are potentially quite damaging. Most unfortunately, the Court applied the EEOC's class-of-jobs-or-broad-range-of-jobs and single-particular-job-is-not-sufficient criteria in its analysis under the "regarded as" prong of the definition of disability.

It is, of course, far from certain that if the EEOC had taken a different stance on the impact of exclusion from a single job under the "regarded as" prong, the Supreme Court would have reached a different outcome in the *Sutton, Murphy,* and *Kirkingburg* cases. After all, the EEOC did take a definitive and consistent stand on the issue of mitigating measures, and the Supreme Court ruled precisely to the contrary. It should be acknowledged that during the past decade, the courts have at times been ill-informed, if not outright hostile, with regard to the interpretation and application of ADA. In light of this demonstrated tendency of courts to construe the statute narrowly, however, the need for the EEOC to play a leadership role in developing progressive ADA policy has been all the more critical.

Now that the Supreme Court has ruled, the EEOC should take action to mitigate the potential harmful effects of these decisions upon complainants, seek to confine the impact of the decisions to their particular facts, and try to distinguish other situations as not within their precedential scope. But what is a certainty is that the EEOC could and should have played a more constructive role in promoting a broader interpretation of the definition of disability in order to ensure the elimination of discrimination on the basis of disability. The EEOC bears a strong responsibility for fostering and not challenging an atmosphere in which the definition of disability became viewed as a technical and restrictive ticket to admission to an exclusive private club of persons entitled to ADA protection.

The fact that the Supreme Court misinterpreted the 43 million figure in the Findings section of ADA (derived from figures in a tabulation issued in 1984 by the Congressional Research Service)[113] as the number of people protected from discrimination rather than only an estimate of those having "actual" disabilities under the first prong of the definition is a travesty, and it is one that the EEOC helped engender by not clarifying the breadth of the third prong to include any American who suffers discrimination on the basis of disability, even if that discrimination occurs on only one occasion in connection with one particular job with a particular employer. The EEOC should have consistently promoted the notion that the "protected class" under ADA encompasses all people who have been subjected to disability discrimination, not just those with actual, substantially impairing disabilities.

Instead, the agency became overly concerned with fringe examples and unlikely hypotheticals and tailored its definitional standards to address these rather than the more usual incidents of disability discrimination that occur every day in the workplace. In the original proposed interpretive guidance accompanying its proposed Title I regulation, the EEOC cited the example of a surgeon unable to perform surgery because of a shaky hand and suggested that such a situation would not establish a substantial limitation on working because it affected only a narrow range of jobs.[114] After the example was challenged by commenters, the EEOC agreed that "[it] confused, rather than clarified, the matter," deleted the example, and replaced it with a scenario of an individual unable to be a commercial airline pilot because of a minor vision impairment but who is able to be a copilot or pilot for a commercial service.[115] The final guidance also referred to two other examples: (1) a professional baseball pitcher who develops a bad elbow and is no longer able to throw a baseball, and (2) a person who "has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere."[116]

While no one could say that the cited examples are impossible, they are certainly not the stuff of everyday employment discrimination. The courts are certainly capable of addressing such exceptional instances if and when they arise and of devising exceptions to the general rules to deal with unusual and idiosyncratic situations. But there was no reason for the EEOC to frame its analytical standards around these extraordinary situations rather than the much more common and harmful problem of employers eliminating individuals from jobs because the worker has a physical or mental impairment. In so doing, the EEOC proved the old legal maxim that "hard cases make bad law."

The difference is quite dramatic between instances when the EEOC manifests strong leadership, takes a definitive and enlightened position on an issue, and advocates robustly for it, as it did with the judicial estoppel issue; and when the EEOC forsakes a leadership role, takes an equivocal and muddled position, and plays only a minor and somewhat negative role in the resolution of an issue, as it did in relation to the application of the single-particular-job-is-not-sufficient criterion to the "regarded as" determination.

On July 26, 1999, the ninth anniversary of the enactment of ADA, the EEOC issued Instructions for Field Offices Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified." These instructions applied some positive aspects of the *Bragdon v. Abbott* decision, which the EEOC characterized as having "broadly interpreted the terms 'impairment,' 'major life activity,' and 'substantial limitation' ...." They also clarify the relationship between a charging party's application for or receipt of disability benefits on the issue of whether the charging party is "qualified," in light of the Supreme Court's decision in *Cleveland v. Policy Management Systems Corp.* The instructions seek to limit, to some extent, some of the damaging aspects of *Sutton v. United Airlines, Murphy v.*

United Parcel Service, and *Albertsons, Inc. v. Kirkingburg*, by indicating that mitigating measures that are not fully effective or that themselves cause activity limitations may not prevent an individual from being found to have a disability.

At the same time, the instructions continue some of the EEOC's problematic stances, including the class-of-jobs-or-broad-range-of-jobs criterion and an overemphasis on probing the exact dimensions of the charging party's impairments and limitations. The instructions note that the *Sutton* and *Murphy* decisions apply the class-of-jobs-or-broad-range-of-jobs standard but do not add that the Supreme Court simply accepted these standards from the EEOC Title I regulations. A more helpful and conscientious position for the EEOC would be to formally reconsider and repudiate its class-of-jobs-or-broad-range-of-jobs criterion as engendering an unnecessary preoccupation with the details of the employee or applicant's condition instead of focusing on the allegedly discriminatory actions of the employer. The instructions illustrate the harmful effects of the EEOC approach as they call for a veritable inquisition into the details of a person's physical and mental impairments, medications, compensatory techniques, and effects upon the whole gamut of life activities, including reproduction, to be followed by interviews with family members, friends, coworkers, rehabilitation specialists, and doctors to corroborate or supplement the person's information.

The instructions direct that only if a charging party is found not to have an actual disabling condition or a record of a disability (based on other detailed questioning and inquiries into and reviews of various records) does the inquiry ever turn to the question whether the employer regarded the individual as having a substantially limiting impairment. This continues the turning of ADA on its head by focusing on the worker's characteristics and limitations rather than the allegedly discriminatory conduct of the employer. And it is not that the courts have forced such a state of affairs on a reluctant EEOC. It is, rather, a situation in which the EEOC took the lead in developing restrictive and technical stances as to the class of persons protected by a new civil rights law.

In an official response to a review draft of this document, the EEOC took exception to the criticism that the field instructions have contributed to the development of bad policy, stating that policy-making is not their purpose. Rather, these documents were intended to respond to practical questions arising in the field about how investigators should handle charges in light of *Sutton, Murphy* and *Albertsons*. The EEOC further asserts that to use the instructions for purposes of policy development would be irresponsible and would violate its own rules and statutory mandates, since only the Commission and its members can make policy decisions.[117] In NCD's view, this response begs the question of whether the field instructions, while not official policy pronouncements, do in fact establish official interpretations of legal decisions that set the course of public policy.

As to the substance of the instructions, the EEOC acknowledged NCD's criticisms while taking the position that detailed inquiries to establish whether someone has a disability are unavoidable, given the case-by-case approach outlined by the Supreme Court in *Sutton*. The EEOC reports that its experience has been that the instructions have helped attorneys and investigators establish coverage in situations where they might otherwise have been inclined to dismiss charges or litigation. Moreover, the EEOC maintains that the instructions have actually been extremely well received outside the Commission, in particular by the plaintiffs' bar.[118] The National Council on Disability agrees that the instructions include some salutary analysis and attempt to provide some amelioration for some of the harmful effects of the *Sutton, Murphy*, and *Albertsons* decisions. The NCD's view, however, is that the instructions do not go nearly far enough to tackle the core issues raised by the decisions. And the central problem is not the case-by-case approach employed by the Court in *Sutton*; the critical question is whether the case-by-case approach is going to be used to dissect the mental and physical characteristics of the complainant or is going to focus on what the employer did or did not do to the complainant.

In response to the NCD's suggestion that ADA "regarded as" coverage be extended to all persons who are denied an equal employment opportunity on the basis of an impairment, the EEOC responded that this position was rejected by the Supreme Court in *Sutton* and indicated that it did not believe that the "class/broad range" requirement can be eliminated, although it may be possible to clarify these terms in future guidances, consistent with the

Supreme Court's decisions in *Sutton* and *Murphy*. As indicated above, NCD would like to see the EEOC accept some responsibility for having created the context in which the Supreme Court was led to its interpretation of the third prong of the statutory definition of disability in *Sutton*, *Murphy*, and *Albertsons* and would like to see the EEOC take some emphatic steps to try to redirect the jurisprudence on this issue.

Another way in which the EEOC created an unnecessary restriction on the interpretation of the definition of disability was through its imposition of a duration factor. In defining the term "substantially limits" in its Title I regulation, the EEOC provided that the following factors are to be considered, in addition to the "nature and severity of the impairment," in determining whether an individual's major life activity is substantially limited:

> (ii) the duration or expected duration of the impairment; and
>
> (iii) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.[119]

In its interpretive guidance, the EEOC elaborated that "temporary, nonchronic impairments of short duration, with little or no long-term or permanent impact, are usually not disabilities."[120] In creating a duration standard and excluding temporary conditions, the EEOC departed from the position of its sister agencies; neither the Department of Justice nor the Department of Transportation ADA regulations include a duration standard.[121]

The language of ADA as proposed and enacted never has contained any limitation or exclusion for "temporary" conditions or any other language imposing or suggesting a duration-of-impairment restriction on conditions that might constitute disabilities under the legislation. Nor does the legislative history of ADA offer any support for such a limitation. The only discussion of impairments that do not substantially limit a major life activity occurs in a sentence in the Senate and the House Education and Labor committee reports on ADA indicating that individuals "with minor, trivial impairments, such as a simple infected finger, are not impaired in a major life activity."[122]

Thus, the EEOC developed the duration requirement and the concept of excluding temporary impairments on its own initiative. The illogical consequences, arbitrariness, proof implications, and other problems with the EEOC's position will not be detailed here, but the critical issue is that the EEOC took upon itself the function of devising a new limitation on ADA protection that Congress had not seen fit to establish.

In its official response to a review draft of this chapter, the EEOC contended that the duration requirement is consistent with both the legislative history and Rehabilitation Act case law, and argued that Congress clearly intended to exclude short-term impairments and that the regulations follow this dictate. Moreover, the Commission declared that it has made clear in the appendix to its regulation and various guidances that impairments do not have to be permanent in order to be considered a "disability" and that intermittent symptoms may still meet the duration requirement. The NCD respectfully disagrees with the EEOC's characterization of both the minuscule prior case law and the legislative history of ADA; while there is a small amount of evidence that Congress intended not to have ADA cover minor and trivial conditions under the first prong of the statutory definition, there is absolutely no suggestion in the congressional debates of excluding otherwise sufficiently serious conditions on the basis of how long they may last. The focus on duration of an impairment is particularly inappropriate, as that factor may not be known with certainty at the time the alleged discrimination occurs and has no bearing on the individual's ability to perform job tasks at the time the alleged discrimination occurs.

In NCD's view, it is highly unfortunate that the agency exercised its discretion to exclude some individuals from the opportunity to challenge acts of discrimination and to erect additional proof obstacles in the path of complainants, instead of using its regulatory authority to foster broad access to the protection afforded by ADA. The result of the narrow, legalistic conception of the definition of disability has been that far too many ADA complainants are overcome by harrowing burdens of proof and severe technicalities and never get their day in court on the issue of the discrimination they claim they were subjected to.

Apart from the definition of disability, similar concerns arise with regard to various other issues. One of these is the EEOC's interpretation of the "direct threat" defense. In the "defenses" section of Title I, ADA states that a covered entity may have a qualification standard requiring "that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[123] The statute defines the term "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[124] In its Title I regulation, the EEOC added substantially to the statutory definition of direct threat by declaring that "Direct threat means a significant risk of substantial harm to the health or safety 'of the individual or others' ...."[125]

While Congress had seen fit to define "direct threat" only in terms of risks to the health or safety of other individuals in the workplace, the EEOC expanded this definition to include risks to the health or safety of the individual himself or herself. In the preamble to the regulation, the EEOC acknowledged that many commentators had "expressed concern that the reference to 'risk to self' would result in direct threat determinations that are based on negative stereotypes and paternalistic views about what is best for individuals with disabilities."[126] Nonetheless, the Commission decided to include "risk to self" in the final regulation.

NCD has serious concerns that the addition of "risk to self" serves as an invitation to employers to get involved in paternalistic conjecturing about perceived dangers to individuals with disabilities, often based on nothing more than employers' ignorance and misconceptions about the particular conditions at issue. Having employers making uninformed judgments that the stress involved in a particular job is too much for an individual with a psychiatric disability, for example, or might cause an individual to commit suicide, is highly contrary to the spirit and language of ADA. The focus on "risk to self" also fosters a perception that individuals with disabilities are often irrational, self-destructive persons.

In the rare situation in which there is objective evidence consistent with current medical evidence,[127] that an individual poses a direct threat to himself or herself, the situation will usually be one in which the individual is not qualified to perform the essential functions of the job and thus can be disallowed from performing the job even without the "direct threat to self" defense. In addition, a person who is a threat to self will frequently also constitute a direct threat to others. But even if a case can be made that there is a need for a threat to self defense in some limited circumstances, the EEOC should leave it to the courts to develop such a defense. The EEOC had no responsibility to invent a new defense to discrimination actions where Congress specifically did not include the defense and easily could have done so had it chosen to.

The EEOC has been largely silent on an important issue related to reasonable accommodation: whether an employee or applicant whom an employer "regards as" having a disability, and who therefore falls within the definition of an individual with a disability under the third prong of the definition, is entitled to reasonable accommodation under ADA. The issue is not mentioned in the Enforcement Guidance on Reasonable Accommodation and Undue Hardship.

Such a position forces individuals whom an employer regards as having a disability and subjects to a negative employment action because of the perceived impairment to resort not to the third prong but rather to the first prong to gain the protection of the statute. At best, this compels an employee unnecessarily to provide medical documentation, including what may be sensitive details about the condition, to verify the existence of a disability that the employer already perceives the worker to have. It also permits the employer to speak out of both sides of its mouth: to say to the worker, I am going to terminate you or deny you a job or take some other negative action toward you, because you have X disability, but I am not going to afford you a reasonable accommodation to permit you to perform the job tasks successfully because you have not proven that your condition is serious enough.

Such a stance once again imposes a formalistic, technical precondition on workers rather than focusing on eliminating discriminatory practices of employers, which is the aim of

Title I of ADA. And, once again, such a position creates an exception to a right granted by Congress in the statutory language of ADA: Title I gives employees who meet the definition of an individual with a disability a right to receive reasonable accommodation to permit them to perform essential job tasks. Nowhere in ADA is there any indication that the statutory duty to provide reasonable accommodation is limited to the first prong of the definition or does not apply to persons who fall under the third prong. The EEOC should seek to have Title I implemented to the fullest extent of the law; it should not be carving out exceptions or technical loopholes that Congress did not see fit to create. Nor should it sit by silently and not weigh in on this significant issue.

The Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer-Provided Health Insurance, issued by the EEOC in June 1993, is not as effective as it might have been in advancing the objectives of ADA. The interim guidance differentiates between health insurance distinctions that are "disability-based" and those that are not. In the process of doing so, the guidance generates an analysis that is artificial and highly convoluted and is confusing as to who has to prove what. It veers away from the critical question of whether particular distinctions are discriminatory or not. It does not make clear the simple but pivotal principle that a health insurance distinction that disadvantages individuals with a particular disability or class of disabilities is discriminatory unless it is based on sound and legitimate actuarial data.

The interim guidance indicated that treating mental and physical disabilities differently with regard to health insurance benefits is not discriminatory under ADA because, astoundingly, it does not involve a distinction that is "disability-based." In so doing, the EEOC took the broadest possible interpretation of the Supreme Court's decision in *Traynor v. Turnage,*[128] and never reached the overriding issue of whether the differential treatment of physical and mental conditions in health insurance is based on sound and legitimate actuarial date. Again, the EEOC missed an opportunity to lead the developing law on an important issue in a positive direction to help eliminate a form of discrimination on the basis of disability. It should be noted that the EEOC has challenged a mental/physical distinction in disability insurance in litigation, construing it to be "disability-based." The agency should have taken a similar position on health insurance benefits.

With regard to the impact of the terms of collective bargaining agreements on ADA obligations, the EEOC has not taken a sufficiently strong stance. For many years, Section 504 regulations have provided that employer obligations under that act are not affected by the terms of any collective bargaining agreement.[129] The legislative history of ADA indicates a congressional intent that this policy should also apply under ADA.[130] In its amicus curiae participation in the case of *Eckles v. Consolidated Rail Corp.*,[131] the EEOC took the position that the labor union should be required to negotiate a variance to protect workers' ADA rights. This was a split-the-difference stance by the EEOC rather than a principled legal position. There is substantial legal precedent for the notion that collective bargaining agreements should not be permitted to limit the rights of employees to protection from discrimination under a civil rights law.[132] The EEOC should have taken a clear and proactive position that ADA rights are not subject to limitation by the terms of collective bargaining agreements.

In an official response to a review draft of this chapter, the EEOC disagreed with NCD's position. In the Commission's view, the legislative history does not support the view that the reasonable accommodation requirement always takes precedence over the provisions of a collective bargaining agreement (CBA) but indicates, rather, that a conflict between a CBA and a reasonable accommodation is a factor in determining whether undue hardship exists, but that such a conflict is not per se undue hardship. The EEOC believes that its position that unions and management must negotiate a change in the CBA, unless it unduly burdens the expectations of other workers, is consistent with this statement of legislative intent. The National Council on Disability disagrees with the EEOC's interpretation of the legislative history and believes that the terms of collective bargaining agreements should not be permitted to undercut or defeat any of the rights of individuals with disabilities under ADA. NCD considers it appropriate that the terms of a collective bargaining agreement should always be construed within a limitation that they may not violate federal law, including, in particular, ADA.

Some very effective uses by the EEOC of subregulatory guidance are described in the previous section. Another noteworthy example is the March 1999 Enforcement Guidance on Reasonable Accommodation and Undue Hardship; apart from the silence on the third prong of the definition of disability, the guidance is generally a constructive and helpful document. In particular, it helps to clarify that working at home can be an appropriate accommodation in the right circumstances and helps to put the problematic, maverick judicial precedent of *Vande Zande v. Wisc. Dept. of Admin.*[133] into a more proper context. In addition, the guidance contains a number of other first impression policy positions, including the following:

- In a detailed discussion of the kind of documentation that can be required to support a request for reasonable accommodation, the guidance emphasized that an employer cannot require an individual to see the employer's doctor where the individual submits sufficient documentation (pp. 12-17).
- The Commission stated that employers must take an active role in the reasonable accommodation process, including identifying vacancies (pp. 11-12, pp. 42-43)
- The Commission emphasized that employers must respond swiftly to requests for reasonable accommodation (p. 19).
- The Commission stated that no-fault leave policies must be modified for individuals with disabilities who need additional leave, absent undue hardship (p. 27).
- The Commission stated that employees cannot be penalized for work missed during leave that is taken as a reasonable accommodation (pp. 28-29).
- With respect to reassignment, the Commission stated that, while an employee with a disability must be qualified for the new position, she or he need not be the best qualified person in order to obtain it (p. 38, p. 34).[134]
- The Commission stated that probationary employees may be entitled to reassignment in some circumstances (p. 40).
- The Commission stated that reassignment is not limited to a specific facility, etc. (p. 42).

- The Commission clarified that reasonable accommodation must be provided to address the side effects of medication or treatment related to disability (p. 50).
- The Commission stated that the lack of a fixed date of return from leave does not automatically pose an undue hardship (pp. 57-58).

Each of these represents a significant, positive policy stance by the EEOC.

The EEOC has also shown that it can use subsequent subregulatory guidances to correct problems precipitated in earlier ones. Thus, the interim Enforcement Guidance on Preemployment Disability-Related Inquiries and Medical Examinations, issued on May 19, 1994, and described in the previous section, included a convoluted and confusing discussion of what employers were permitted to ask about a physical or mental impairment that was visible or otherwise legitimately known to them. The final guidance, issued in October 1995, contains a much more definitive and cogent discussion of the issue.

There are many more areas, however, in which subregulatory guidance is needed, especially to help employers fulfill their obligations under the act with regard to particular areas and issues. Additional guidance addressing certain areas of application of the reasonable accommodation requirement could be very helpful; technological accommodations, accommodations regarding transportation and parking, and additional clarification regarding working at home are some areas in which such guidance would be valuable.

An especially critical area in which employers need additional assistance is in identifying and hiring more applicants with disabilities. Employment rates of individuals with disabilities continue to be horrendously low. In the current economy, many employers are actively seeking qualified workers but are nonetheless underemploying potential workers with disabilities. Moreover, despite the requirements of ADA, applicants for employment who have disabilities of which employers are aware often have no way of knowing or proving whether they were subjected to discrimination when they do not get jobs they apply for; for such individuals, discrimination complaint procedures are of little avail. To address this situation, the EEOC should provide employers with additional guidance about barriers in the application and hiring process and assistance in developing application and hiring procedures that are free from such barriers. In addition, it would be helpful for EEOC's Web site and publications to include references and links to information for employers about networks providing access to potential workers with disabilities, resources available in particular states (including those provided by state government agencies), and such resources as the résumé bank of the President's Committee on the Employment of People with Disabilities.

The EEOC should also make more proactive use of subregulatory guidance prompted by developments in the courts or otherwise. Sometimes it has done so; it followed up certain decisions of the United States Supreme Court with explanatory guidances.[135] It did not, however, issue a guidance with regard to the Supreme Court's decision in *Bragdon v. Abbott*,[136] an important decision in which the Court manifested a receptive interpretation of major life activities other than working, although the Commission did eventually include an interpretation of some aspects of the *Bragdon* decision in its July 1999 Instructions for Field Offices Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified." The EEOC could have demonstrated more leadership in addressing various types of barriers to employment, such as health and safety standards imposed with regard to jobs in the transportation field and other preconditions to specific types of employment.

The guidance on psychiatric disabilities provides a unusual example of the EEOC issuing a guidance that is linked to a particular category of disability. The Commission is reluctant to frame its guidances as focusing on specific disabilities and thus suggesting that ADA treats different disabilities differently. On the contrary, the EEOC believes the legal requirements and analyses should be the same, regardless of the type of disability. If the EEOC began issuing guidance on individual disabilities, it believes it would then be pressured to do so for every condition. In its view, such guidance would be repetitive and serve little purpose in increasing employer or judicial understanding of ADA. The Commission explains that it chose to issue the Guidance on Psychiatric Disabilities because (1) many employers and persons with psychiatric disabilities were unaware that ADA protected people with such disabilities; (2) there is pervasive stigma attached to psychiatric disabilities; and (3) some unique legal issues are raised by the application of ADA to psychiatric disabilities.

The National Council on Disability respects the EEOC's position that the legal principles applicable under ADA are not disability-specific and certainly does not believe that the EEOC should issue a separate guidance for each type of disability. Nonetheless, there are certain clusters of disabilities—for example, nonpsychiatric mental disabilities such as learning and cognitive disabilities—for which such guidance or technical assistance documents are needed. Regarding the example of learning and cognitive disabilities, these affect a relatively large number of people; they are not understood by many employers; and they often raise substantial common legal issues, particularly with regard to their identification in the employment context, the appropriateness of and need for documentation of the conditions, and techniques for accommodating them. Moreover, NCD believes that additional policy clarification may on rare occasions be necessary with regard to more narrow categories of disability or perhaps even a particular disability. If, for example, the Centers for Disease Control (CDC) had not issued various documents outlining appropriate workplace procedures relating to HIV protection, it would have been quite appropriate and prudent for the EEOC to have taken a leadership role in issuing a policy document addressing this issue (including appropriate accommodations and the application of ADA's "direct threat" standard).

NCD recognizes that the EEOC has a range of possible ways of providing information and direction with regard to disabilities and categories of disabilities. These include the use of disability-specific examples in policy and technical assistance documents (which the EEOC has done with admirable frequency), devoting all or a portion of technical assistance documents to issues raised by a particular disability or category of disability, and addressing such issues in all or a portion of a policy guidance. In most cases, which of these means is employed is not critical as long as the information and direction are provided. But it is necessary that the EEOC systematically review its policy and technical assistance documents to determine what disabilities and categories of disability are insufficiently represented and addressed, and develop additional technical assistance and policy instruments to address unmet needs. As but two examples, the workplace implications of multiple chemical sensitivity and traumatic brain injuries have not received adequate attention in EEOC policy and technical assistance documents.

Likewise, many employers could use additional instruction regarding barrier removal and accommodations for people with sensory impairments, particularly impaired hearing and vision, including direction to employers on how to design universally accessible technologies for their employees. In an official response to a review draft of this chapter, the EEOC suggested that these issues are more appropriately addressed by the Architectural and Transportation Barriers Compliance Board (Access Board), which is issuing guidance on these issues pursuant to Section 508 of the Rehabilitation Act. The EEOC also noted that the attorney general has released a report in which she asks that the president direct the Department of Justice, in consultation with the EEOC, the Office of Personnel Management, and the Access Board, to issue guidance explaining the relationship of Sections 501, 504, and 508 of the Rehabilitation Act. The EEOC suggests that this guidance would probably address at least some of the concerns raised in the NCD draft report.

NCD believes, however, that the EEOC has a particular responsibility to bring necessary information to the attention of employers, many of whom will have little familiarity with or likelihood of monitoring the issuances of the Access Board or the Department of Justice's reports regarding Section 508 and other provisions of the Rehabilitation Act. Even if Access Board guidelines address workplace settings, the EEOC should, as part of its technical assistance function, summarize relevant provisions or at least include specific references to the appropriate Access Board materials in EEOC documents, to direct employers to the appropriate information.

The EEOC also points out that its Enforcement Guidance on Reasonable Accommodation and Undue Hardship contains numerous examples of technological accommodations. These examples include the following:

- Example B in the answer to question 6 (on documenting disability and the need for reasonable accommodation) discusses an individual with a learning disability who needs a laptop computer in order to take notes at meetings.
- Example B in the answer to question 10 (concerning an employer's obligation to provide accommodations without unreasonable delay) involves a person who is blind and needs adaptive equipment for a computer, an extremely important type of technological accommodation.
- Question 14 focuses entirely on the issue of providing accommodations necessary to make information communicated in the workplace accessible. Example A deals with an unfortunately all-too-common problem that people with disabilities face when technology in the workplace changes. The example emphasizes that an employer must provide new adaptive computer equipment for someone whose current adaptive equipment does not work with the employer's "upgraded" system. Example B involves the use of electronic mail for certain types of communications with persons who have hearing impairments.
- Example B in Question 38 illustrates an employer's obligation to provide accommodations for the limitations of conditions arising from an underlying disability. The example concerns an individual with diabetes who develops retinopathy and, as a result, needs a computer program that will enlarge the size of text on the screen.

The National Council on Disability recognizes and applauds these and other attempts by the EEOC to address technology issues. It continues to believe, however, that as the nation's workplaces move rapidly into the technology and telecommunications age, it would greatly advance ADA enforcement for the EEOC to issue a guidance or a separate technical assistance document that presents, in a single place, information and direction about the application of ADA requirements to workplace technology.

In short, subregulatory guidance and technical assistance documents have proven to be a very useful tool for facilitating ADA implementation. At times, the EEOC has made very positive use of policy guidances. There is still, however, plenty of room for more creative, proactive, and frequent issuance of such guidances and of additional technical assistance materials.

In its official response to a review draft of this chapter, the EEOC strongly objected to the tone of the discussion of its policy-making activities in the review draft and declared that the discussion did not serve EEOC's and the National Council on Disability's collective interest in more effective enforcement of ADA. The EEOC indicated its belief that

> [a]s currently written, the discussion appears to go beyond a statement of policy differences, and instead suggests that the Commission has intentionally disregarded the interests of people with disabilities and deliberately undermined enforcement of ADA. The draft chapter strongly suggests that the Commission has reached out to find obstacles to enforcement, that it has addressed policy issues in an unprincipled manner, and that it has essentially caused the *Sutton* decision. We strongly disagree with these suggestions. Furthermore, such an intemperate discussion does not advance the government's enforcement interests.[137]

In response to other, specific suggestions of the EEOC, NCD made revisions to the section and added materials to section 3.9.1 describing the considerable accomplishments of the EEOC. NCD regrets any impression that the review draft vilified the Commission or its staff or that NCD was attributing intentional misconduct or unprincipled performance to the EEOC in its policy-making activities. NCD recognizes that the EEOC has been responsible for a number of very positive developments and has many accomplishments to be proud of. NCD is also very aware that many of the policies of EEOC that NCD takes issue with in this report were established many years ago and were not the product of the current Commission. Nor does NCD doubt that the policy positions criticized in this section, whenever they were espoused, were adopted in good faith and with positive intentions.

It is NCD's view, however, that many of these policy stances by the EEOC were and are misguided and have resulted in substantial harm to persons with disabilities who have encountered employment discrimination. And while the current Commission was not responsible for developing most of the policies complained of, it must bear some responsibility for not having repudiated them and setting a new, more positive course. Further, while it is true that the EEOC did not "cause" the Supreme Court's decisions in the

Sutton, Murphy, and *Albertsons* cases, nor that it desired such outcomes, it is also true that standards and analysis articulated and repeated by the EEOC have affected countless lower court decisions, and EEOC's approach, coupled with its silence or lack of clarity on some other critical conceptual issues, created an analytical context within which the Supreme Court's restrictive interpretation of the definition of disability was not only possible but a reasonably probable outcome. The restrictive approach to the definition of disability that the EEOC helped to spawn ultimately proved more potent than the EEOC's analysis on the specific issue of mitigating measures.

Far from thinking that the EEOC wanted the *Sutton, Murphy,* and *Albertsons* cases to turn out as they did, NCD is cognizant that the EEOC's litigative efforts have been drastically and negatively affected by these decisions, as have individual Title I plaintiffs and their advocates in pursuing their cases. NCD would like EEOC to take dynamic and concrete steps, described in the following recommendations, to try to redirect the course of jurisprudence in this area and to have ADA become the powerful engine for eliminating discrimination that it was intended to be and not stay bogged down in technical restrictions as to how provably severely impaired a person must be in order to be eligible for the protection of ADA.

3.9.3 Findings and Recommendations

Finding 26: The EEOC has taken strong, timely, and appropriate policy positions on various issues.

Examples include the following:

- Providing in the interpretive guidance for its Title I regulation that whether an impairment exists or substantially limits a major life activity should be determined without regard to mitigating measures such as medicines or assistive or prosthetic devices.
- Including, in the guidance memorandum on the definition of disability, as an example included within the "regarded as" prong of the definition of disability, a person with genetic predisposition to disease or disability.

- Issuing its groundbreaking and helpful Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities.
- Multifaceted efforts, including enforcement guidance and litigation, related to the issue of judicial estoppel.
- Taking, with only a few exceptions, sound policy positions supported by cogent analysis in its litigation activities.

Finding 27: The accessible, user-friendly style of the EEOC's enforcement guidances, with numerous concrete examples, provides an excellent model for all ADA guidance documents.

Recommendation 34: The other ADA enforcement agencies should seek to employ the readable, example-filled, accessible style of EEOC's enforcement guidances.

Finding 28: The EEOC's performance of its policy leadership role regarding the enforcement of Title I of ADA has fallen short in a number of instances.

The EEOC has often not provided the leadership one would expect of the agency statutorily designated to oversee the implementation of a major new civil rights law. Instead of trying to vigorously spur ADA compliance to the fullest extent of the law, the EEOC has too often created technical exceptions to ADA requirements and narrowly restricted the application of Title I. It has sometimes seemed more anxious to reassure employers or to earn their good will than to root out tenaciously the discrimination in employment that ADA condemns as unlawful.

Recommendation 35: The EEOC should take a dynamic leadership role in ensuring the vigorous, full, and timely implementation of Title I requirements in complete fulfillment of the spirit and language of ADA and should adopt proactive positions that will further to the greatest possible extent the elimination of discrimination prohibited by ADA and the achievement for American workers and job-seekers with disabilities of the "equality of opportunity, full participation, independent living, and economic self-sufficiency" that Congress declared was ADA's purpose.

The EEOC should review its current policy positions and revise those that are not consistent with ADA's general purposes and the specific language and spirit of Title I's provisions. It should also engage in strategic planning to identify and "get ahead of the curve" on current and upcoming issues. It should not create or maintain any restrictions on ADA protection or on the rights afforded employees or job applicants that are not imposed by the statute itself.

Finding 29: The EEOC has repeatedly taken unnecessarily restrictive positions regarding the definition of "disability" and has erected obstructions that have impeded persons who seek to claim the protection of ADA.

The EEOC developed class-of-jobs-or-broad-range-of-jobs and single-particular-job-is-not-sufficient criteria not found in the statutory language of ADA and remained silent when some courts started applying these criteria under the second and third prongs of the definition in addition to the first. While the EEOC made some efforts to ameliorate the harshness of its stance, it never corrected the central defect, that its criteria require complainants to prove what was in the mind of an employer—an onerous evidentiary burden. The EEOC's confined, technical approach to the definition of disability helped to create a judicial climate that culminated in the decisions of the Supreme Court in the *Sutton, Murphy*, and *Kirkingburg* cases, restrictively construing the definition.

The EEOC also imposed a duration limitation on ADA Title I protection that Congress had not seen fit to establish and that neither the Department of Transportation nor the Department of Justice found necessary.

Recommendation 36: The EEOC should reorient its policy positions on the interpretation of the definition of disability and take clear and explicit actions to mitigate the impact of its previous restrictive positions and to promote, to the maximum extent possible, an inclusive interpretation of the scope of ADA protection to extend to all persons whom an employer disadvantages because they have a physical or mental impairment. At a minimum, the EEOC should

- Issue subregulatory guidance clarifying that the third prong of the definition of individual with a disability includes any American who suffers discrimination on the basis of physical or mental impairment, even if that discrimination occurs on only one occasion in connection with one particular job with a particular employer, and explaining that the portions of the *Sutton, Murphy*, and *Kirkingburg* decisions interpreting the third prong of the definition represented an uninformed misapplication of first prong analysis to the third prong.

- Issue subregulatory guidance explaining the *Sutton, Murphy*, and *Kirkingburg* decisions and seeking to confine the impact of these rulings to their particular factual contexts.
- Pursue in litigation and in policy activities a proactive and concerted strategy of distinguishing the *Sutton, Murphy*, and *Kirkingburg* rulings as much as possible from other factual situations, with the goal of confining the impact of these rulings to their peculiar facts.
- Issue subregulatory guidance elaborating on the *Bragdon v. Abbott* decision and stressing its broad, nontechnical interpretation of substantial limitations with regard to major life activities other than working.
- Issue, as part of its responsibility to review the Title I regulation on the 10-year anniversary of ADA, a supplemental Title I regulation to (1) remove the duration limitation that its original regulation inserted as a standard in the determination of substantial limitation, and make it clear that a condition that an employer treats as substantial satisfies the definition no matter how temporary it may prove to be; and (2) promote an inclusive interpretation of the definition of disability and, in particular, the third prong of the definition.

In the first of the specifically recommended guidances, the EEOC should point out that the portions of *Sutton, Murphy*, and *Kirkingburg* addressing the "regarded as" prong were based on misimpressions of previous EEOC guidance rather than substantive legal analysis by the Supreme Court, and should articulate the broad interpretation of the third prong that Congress intended. The EEOC should expressly repudiate any application of the class-of-jobs-or-broad-range-of-jobs and the single-particular-job-is-not-sufficient criteria under the third prong of the definition and clarify that an employer's action that excludes or significantly disadvantages an applicant or employee on the grounds of physical or mental impairment is sufficient to constitute the employer as having "regarded" the applicant or employee as having a disability.

In its official response to a review draft of this chapter, the EEOC reported that it has already taken or is taking steps consistent with the second, third, and fourth of the bulleted specifically recommended actions. Specifically, the EEOC states that it issued the field instructions several weeks after the *Sutton, Murphy*, and *Kirkingburg* decisions were issued in order to analyze their impact and suggest ways that individuals can still show a "disability." The EEOC also observes that the field instructions emphasized the need to expand the list of major life activities, consistent with the Supreme Court's interpretation of "major life activities" in *Bragdon v. Abbott.* The EEOC declares that it is closely monitoring case law developments and working to pursue appropriate litigation regarding these issues and also is considering whether further guidance would be appropriate and helpful. Since the field instructions were not subject to a formal vote of the Commission and were not intended as a policy-making vehicle, the National Council on Disability recommends that the EEOC issue guidance documents to address these issues in a forceful, dynamic, and forward-looking manner.

Finding 30: The EEOC added a risk-of-harm-to-self component to the "direct threat" defense; Congress had specifically limited the defense to risks to "others."

Such a statutorily unwarranted expansion of "direct threat" invites employers to engage in paternalistic conjecturing about perceived dangers to individuals with disabilities, often based on nothing more than employers' ignorance and misconceptions about the particular conditions at issue. It also arouses fears that workers with disabilities are irrational, self-destructive, and unable to take care of themselves.

Recommendation 37: The EEOC should issue, as part of its responsibility to review the Title I regulation on the 10-year anniversary of ADA, a supplemental Title I regulation to remove the risk-of-harm-to-self component from the direct threat defense, with interpretive guidance to explain why such a component is problematic and generally unnecessary.

To the extent that a particular set of facts may suggest the need for recognizing such a component, the EEOC should leave it to the courts to devise exceptions to the statutory standard that may be deemed necessary in extreme circumstances.

Finding 31: The EEOC has largely remained silent on whether employers are required to provide reasonable accommodations for workers who satisfy the third prong of the definition of disability; that is, they are regarded by the employer as having a substantially limiting impairment.

Title I of ADA gives employees who meet the definition of individual with a disability a right to receive reasonable accommodations to permit them to perform essential job tasks and does not indicate that the duty to provide reasonable accommodations is limited to the first prong of the definition or does not apply to persons who fall under the third prong.

Recommendation 38: The EEOC should clearly and forcefully declare that individuals who satisfy any of the three prongs of the "individual with a disability" definition are entitled to reasonable accommodations.

Finding 32: The EEOC's interim enforcement guidance on Disability-Based Distinctions in Employer-Provided Health Insurance presents an analysis that is convoluted and confusing, particularly as to who has to prove what, and does not make it clear that a health insurance distinction that disadvantages individuals with a particular disability or class of disabilities is discriminatory unless it is based on sound and legitimate actuarial data.

The interim guidance takes an unnecessarily broad view of the ruling of the Supreme Court in *Traynor v. Turnage* and does not confront the critical issue of whether differences in treatment of physical and mental conditions in health insurance are or are not based on up-to-date, sound, and legitimate actuarial date. In general, the EEOC has not been as active and clear as it should be regarding the implications of ADA for the entire area of insurance benefits, including life, accident, disability, liability, and other types of insurance programs, in addition to health insurance.

Recommendation 39: The EEOC should issue enforcement guidance that takes a clear position that any disadvantageous, differential treatment of individuals based on disability with regard to any type of insurance benefit that is not supported by sound, current, and legitimate actuarial data is prohibited by ADA.

This principle should be applicable to life insurance, accident insurance, disability insurance, liability insurance, health insurance, and other types of insurance. It should apply to differences in insurance programs' treatment of physical conditions and mental conditions, as well as to other differences based on disability.

Finding 33: The EEOC has not sufficiently addressed the issue of medical standards employed to make insurance determinations, nor has it examined the actuarial evidence insurance companies use to support such standards.

Insurance companies support their standards with actuarial data that are not equally available to complainants for scrutiny and potential challenge.

Recommendation 40: The EEOC should initiate a project to determine what medical standards are being applied by insurance companies; identify what actuarial data and information the medical standards insurance companies assert to justify the standards; assess how accurate, timely, and relevant the asserted justifying data are; and develop independent data and information to serve as a comparative yardstick.

Finding 34: Not enough is known about the medical standards and data employers rely on in making hiring, rehiring, and return-to-work decisions.

Recommendation 41: The EEOC should initiate a project to determine what medical standards are being applied by employers in making hiring, rehiring, and return-to-work decisions, and to assess the reliability and relevance of such standards.

Finding 35: The EEOC has taken a compromising position that labor unions should be required to negotiate variances to protect workers' ADA rights instead of a principled legal position that ADA rights are not subject to limitation by the terms of collective bargaining agreements.

Recommendation 42: The EEOC should take a clear position that the rights and procedures guaranteed to applicants and workers under ADA are not subject to elimination or limitation by the terms of collective bargaining agreements.

Finding 36: The EEOC has shown that subregulatory guidance can be used very effectively to promote the implementation of Title I requirements; much more use of such guidance is needed.

Recommendation 43: The EEOC should make considerably more use of subregulatory guidance on a proactive basis; it should regularly identify issues and areas upon which additional direction and information are needed, and then should issue technical assistance materials or, as appropriate, subregulatory guidance providing such direction and information.

Additional guidance or technical assistance materials are needed to: (1) address particular areas of application of the reasonable accommodation requirement, such as technological accommodations, accommodations regarding transportation and parking, and additional clarification regarding working at home; (2) react to significant developments in the courts or elsewhere; (3) provide needed information and advice concerning particular categories of disabilities; and (4) provide additional direction regarding barrier removal and accommodations for people with sensory impairments, particularly impaired hearing and vision, including instruction to employers about designing universally accessible technologies. The EEOC may be able to adequately address some such issues through technical assistance materials and may not need to issue a guidance. The Commission should, however, systematically identify the various areas in which more direction and information are needed and then take timely action, by issuing guidances or producing technical assistance materials, to address the needs.

Finding 37: The EEOC has not engaged in any proactive strategies to address discrimination in the hiring process, a problem that charge processing does not address well. There is a critical need for assistance for employers in identifying and hiring qualified applicants with disabilities; employment rates of people with disabilities continue to be dismal.

Recommendation 44: The EEOC should place a priority on addressing problems faced by potential workers with disabilities in entering the workforce and securing appropriate jobs and should provide employers with guidance on how to eliminate barriers to people with disabilities in the application and hiring processes.

The EEOC should provide a variety of guidance and information to employers with regard to eliminating barriers in identifying and hiring applicants with disabilities. The EEOC should develop and implement strategies for addressing discrimination in the application and hiring processes. Among these strategies, the EEOC should consider

- Targeted monitoring and enforcement efforts directed at employers who appear to engage in a pattern or practice of hiring discrimination.
- Compliance reviews and monitoring of employer job application practices.
- Assessment of hiring policies and standards, including medical standards, in targeted industries or professions.
- Use of job applicant testers.

The EEOC's Web site and publications should include references and links to networks, information, and resources for employers to increase their access to potential workers with disabilities.

Recommendation 45: As the EEOC considers future amendments to its National Enforcement Plan, it should place a priority on facilitating the filing and handling of charges by individuals with particular categories of disabilities for whom EEOC litigation is occurring at a rate substantially under that expected in relation to their proportion of the population

Some people with particular types of disabilities—mental retardation and other cognitive impairments, for example—may have difficulties recognizing violations of ADA, filing charges, or convincing the EEOC of the need to pursue court action. The EEOC should consider whether these or other categories of disabilities are being insufficiently addressed in the courts and other forums for resolving ADA complaints and should take steps to facilitate increased EEOC activity on behalf of individuals with such disabilities. In its official response to a review draft of this chapter, the EEOC indicated its agreement with increasing outreach efforts toward *all* individuals with disabilities, including those who may have difficulty recognizing that their rights may have been violated, but disagrees that outreach should target individuals with specific disabilities. The National Council on Disability considers the EEOC's articulation of its position to miss the point of the recommendation; if enforcement of Title I is not sufficiently addressing discrimination against people with certain types of disabilities because they have difficulty, because of their particular disabilities, recognizing a violation or in knowing how to file a complaint to assert their rights, a targeted response is necessary to address the gap in enforcement. A generic response, as the EEOC articulates its position, is nearly equivalent to no response at all. The EEOC should examine court decisions and its litigation docket to identify categories types of employment discrimination—whether against certain subgroups of the class of individuals with disabilities or involving particular categories of jobs or industries—in which the enforcement process does not appear to be adequately addressing the discrimination problems that exist. The EEOC should then take corrective action that is specifically focused to correct the inadequacies identified, including, when needed, outreach to workers and applicants with particular types of disabilities.

3.10 Resources and Enforcement Limitations

As with other areas of EEOC responsibility, its activities for the enforcement of ADA occur within and are affected by limitations on the financial and personnel resources it has available for such enforcement activities. A major purpose of the EEOC's National Enforcement Plan is formulating a "strategic enforcement strategy" to enable it to use its limited enforcement resources proactively for greatest effect.[138] Among the areas in which EEOC enforcement of ADA has been deficient or less than optimal, many, although certainly not all, are related in some degree to limitations in the EEOC's fiscal and personnel resources for ADA activities.

Various aspects of the EEOC's ADA enforcement efforts—including charge processing, investigation, litigation, maintenance of its database, use of mediation for alternative dispute resolution,[139] and, in particular ADA training programs—are influenced by resource limitations. With regard to charge processing, for example, the EEOC's approach of categorizing charges as A, B, or C, derived from a recommendation of the Charge Processing Task Force, results in certain cases (Category B, which initially appear to have some merit, but need further evidence to determine whether a cause finding is likely) only being investigated to the extent that resources permit. This results in some cases that would have proven meritorious and been reclassified as Category A if they had been investigated not being investigated because sufficient resources were not available. This three-category approach was devised to address the serious problem of backlogged charges that had plagued the EEOC from the beginning of its ADA enforcement responsibility.

The EEOC's ability to provide needed training to its employees, FEPAs, and contractors engaged in ADA enforcement activities has similarly been hampered by insufficient funding for training efforts. The Joint Task Force report explicitly acknowledged that the EEOC's training needs far exceed its resources. Although funding levels have been increased, they still do not adequately provide for sufficient ADA training. For example, although the FEPAs handle approximately 35 percent of ADA charges, many FEPA staff members handling ADA charges have not received sufficient training on the content, standards, and unique features of ADA. The complexities and ongoing development of ADA standards and analysis necessitate that even those enforcement personnel who may have received adequate initial training need continuing training on a periodic basis. Likewise, resource limitations have contributed to deficits in the EEOC's technical assistance activities, including particularly technical assistance for members of the disability community. Resource limitations contribute to the EEOC's failure to provide sufficient technical assistance targeted to specific groups, such as those from diverse cultural backgrounds, rural residents, and youth with disabilities. Resource restrictions may also help to explain the insufficiency of the EEOC's efforts to explain ADA to the public in a positive manner.

3.10.1 Findings and Recommendations

Finding 38: A shortage of fiscal and personnel resources has played a role in many of the shortcomings of EEOC ADA enforcement.

The resource limitations factor should not be overplayed. Fiscal and personnel limits are certainly not the sole problem. Prior recommendations identify numerous improvements that the EEOC could make, irrespective of additions to its funding. Nonetheless, the enforcement of ADA is a highly important and very resource-intensive endeavor and cannot be accomplished without an adequate infusion of resources, considerably beyond what has been provided to date.

Finding 39: Despite substantially increased EEOC responsibilities associated with ADA enforcement beginning in 1992, the EEOC did not see an addition to its budget in real dollars until FY 1999; even with recent budget increases, the EEOC's budget is still not sufficient to support a full array of strong and comprehensive ADA enforcement activities.

The over-15-percent budget increase the EEOC received in 1999 was long overdue and much needed. It enabled a number of improvements and positive initiatives in ADA enforcement activities. To conduct an adequate and effective ADA enforcement program that fully meets the statutory responsibilities assigned to it, however, the EEOC requires still more in resources.

Recommendation 46: Congress should approve President Clinton's request for a 14 percent increase in the annual budget of the EEOC, and the EEOC should apply this increase proportionately to increase resources devoted to ADA enforcement. In conjunction with this funding increase, Congress should attach conditions on how the increased resources shall be used, including placing a priority on the following ADA enforcement activities:

- investigating and processing additional charges
- increasing ADA training
- expanding and improving technical assistance
- updating and maintaining the CDS database
- overseeing and evaluating mediation efforts
- making more culturally competent training and public education materials available, and
- pursuing more strategic litigation, including class action suits.

President Clinton proposed the increased civil rights funding during a speech on Martin Luther King, Jr.'s birthday on January 15, 2000, and referred to it again during his State of the Union message on January 27, 2000. The receipt of such funding should enable the EEOC to accomplish many of the objectives whose nonachievement is related to insufficient resources. In particular, with regard to its ADA training responsibilities, the EEOC should increase its training for ADA enforcement staff members of the FEPAs and, at such time as resources permit training of all such staff members, the EEOC should require, as a precondition of its contractual funding to FEPAs, that all staff members of FEPAs who will be called upon to handle ADA matters must attend such training.

Endnotes

1. EEOC *Strategic Plan*, September, 1997, p. 33.

2. EEOC, *Strat Plan egic*, op. cit., p. 34.

3. U.S. Civil Rights Commission, *Helping Employers Comply with the ADA*, September, 1998, p. 41.

4. See EEOC, *Directives Transmittal: Organization, Mission, and Functions*, EEOC Notice 110.002, May 11, 1997.

5. *Directives Transmittal*, op. cit.

6. U.S. Civil Rights Commission, *Helping Employers Comply with the ADA* p. 60, interviews cited in notes 213, 214, 215, 216, 216.

7. U.S. Civil Rights Commission, *Helping Employers Comply with the ADA* p. 58, row 2.

8. U.S. Civil Rights Commission, *Helping Employers Comply with the ADA* p. 59.

9. U.S. Civil Rights Commission, *Helping Employers Comply with the ADA* p. 59.

10. U.S. Civil Rights Commission, *Helping Employers Comply with the ADA* p. 60.

11. EEOC, *Budget and Staffing*, at www.eeoc.gov/budget.html, last update, December 10, 1998.

12. In 1998, EEOC staff data indicate that approximately 6.7 percent of the EEOC managerial staff reported a disability. Because employees are not obligated to report a disability, this may underestimate the percentage.

13. EEOC, *Budget and Staffing*, at www.eeoc.gov/budget.html, last update, December 10, 1998.

14. EEOC, *Charge Processing Task Force*, report, March 1995.

15. EEOC, *Priority Charge Handling Procedures*, June 1995.

16. EEOC, *EEOC's State and Local Program and Relationship with Fair Employment Practice Agencies*, March 15, 1995.

17. EEOC, *EEOC's State and Local Program and Relationship with Fair Employment Practice Agencies*.

18. EEOC, *Task Force on Alternative Dispute Resolution*, March 1995.

19. EEOC, *National Enforcement Plan*, February 1996, p. 2.

20. EEOC, *National Enforcement Plan*, p. 3.

21. These are "Claims raising unresolved questions under the Americans with Disabilities Act regarding the meaning of 'reasonable accommodation' and the term 'qualified individual with a disability,' as well as the defenses of 'undue hardship' and 'direct threat;' claims presenting questions regarding the interpretation of the prohibition of disparate impact discrimination under the Civil Rights Act of 1991, the Age Discrimination in Employment Act, and the Americans with Disabilities Act claims based on the intersection of two or more prohibited bases of discrimination (e.g., discrimination against women of color, older women, or persons from culturally diverse backgrounds with disabilities); claims presenting unresolved issues regarding the provision of employee benefits, including claims arising under Title I of the Older Workers Benefits Protection Act and the Americans with Disabilities Act." EEOC, *National Enforcement Plan*, p. 5-6.

22. U.S. Civil Rights Commission, *Helping Employers Comply with the ADA* p. 53, interviews cited in notes 155, 156, 157, 158.

23. EEOC, *Priority Charge Handling Task Force, Litigation Task Force Report*, March 1998.

24. EEOC, "Commission Hears Recommendations from Civil Rights Groups on Agency Priorities for 1999," press release, January 27, 1999, at www.eeoc.gov/press/1-2799.html, last update February 3, 1999.

25. U.S. Commission on Civil Rights, *Helping Employers Comply with the ADA*, p. 67. This report also provides a more detailed description of the procedure and a summary of the comments received.

26. U.S. Commission on Civil Rights, *Helping Employers Comply with the ADA*, p. 70.

27. EEOC, *Priority Charge Handling Procedures*, June 1995.

28. U.S. Civil Rights Commission, *Helping Employers Comply with the ADA*, p. 190-91.

29. EEOC, *Priority Charge Handling Task Force, Litigation Task Force Report*, March 1998, p. 35.

30. U.S. Civil Rights Commission, *Helping Employers Comply with the ADA*, p. 192.

31. 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999).

32. 119 S.Ct. 2139 (1999).

33. 119 S.Ct. 2133 (1999).

34. 119 S.Ct. 2133 (1999).

35. EEOC, *Charge Processing Task Force*, p. 19.

36. EEOC, *Charge Processing Task Force*, p. 4-5.

37. *Charge Processing Task Force*, p. 4-5

38. *Charge Processing Task Force*, p. 8

39. U.S. Commission on Civil Rights, *Helping Employers Comply with the ADA*, p. 195.

40. EEOC, *Priority Charge Handling Task Force, Litigation Task Force Report*, March 1998, p. 5.

41. EEOC, *Priority Charge Handling Task Force, Litigation Task Force Report*, March 1998, p. 17.

42. EEOC, *EEOC's State and Local Program and Relationship with Fair Employment Practice Agencies*, 1995, p. VIII-6.

43. EEOC, *Priority Charge Handling Procedures*, p. 11.

44. Interview with Leo Sanchez, August 26, 1998.

45. Nancy Mudrick, "Employment Discrimination Laws for Disability: Utilization and Outcome, *The Annals of the American Academy of Political and Social Science*, W.G. Johnson (special editor), v. 549, January 1997.

46. EEOC, *Commission Hears Recommendations from Civil Rights Groups on Agency Priorities for 1999*, press release, January 27, 1999, found at www.eeoc.gov/press/1-27-99.html.

47. The expanded effort was marked by a joint press release from Vice President Al Gore and EEOC Chairwoman Ida L. Castro. The text of the press release, a question-and-answer explanation of mediation, and other information about the EEOC mediation program were put on the EEOC Web site on February 11, 1999, www.eeoc.gov/mediate/index.html.

48. EEOC, *Task Force on Alternative Dispute Resolution*, March 1995; EEOC, *Annual Performance Plan Fiscal Year 1999*, Congressional Transmittal, February 1998 at www.eeoc.gov/plan/app.html.; and EEOC, *EEOC Enforcement Activities*, at www.eeoc.gov/enforce.html, last update, December 10, 1998.

49. These statistics are based upon summary data provided by the EEOC.

50. U.S. Commission on Civil Rights, *Helping Employers Comply with the ADA*, p. 205.

51. This information is available at www.eeoc.gov/mediate/history.html.

52. U.S. Department of Labor, Office of Federal Contract Compliance Programs, *Cases Involving Equal Employment Opportunities for Individuals with Disabilities*, no date.

53. *Annual Performance Plan Fiscal Year 1999*, Congressional Transmittal, February 1998 at www.eeoc.gov/plan/app.html, Goal I.A., p. 2.

54. Presentation by Sherry Powers, Office of the General Counsel, EEOC, to Interagency Subcommittee on Disability Statistics, December 9, 1998.

55. 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999).

56. 119 S.Ct. 2139 (1999).

57. 119 S.Ct. 2133 (1999).

58. 119 S.Ct. 2162 (1999).

59. 118 S.Ct. 2196 (1998).

60. The percentages are rounded off. Due to variations in the total number of ADA cases filed, the actual number of class action suits fell slightly in 1999 to 13 cases, down from 14 in 1997 and 15 in 1998. The EEOC explains the drop of total ADA suits filed from 69 in 1997 and 73 in 1998 to 45 in 1999 as follows: " In the aftermath of the Supreme Court's decisions in *Sutton* and related cases, the EEOC undertook an in-depth analysis of its ADA litigation docket, including cases pending filing, and restructured its cases to meet the additional evidentiary requirements imposed by those Supreme Court decisions. This process slowed down the filing of new ADA cases in fiscal year 1999." Memorandum of Bill White, acting director, Office of Communication and Legislative Affairs, EEOC, May 4, 2000, p. 3.

61. See section 3.1.

62. See section 3.3.3.

63. See id. and section 3.5.

64. This field-office-initiated training is described in the report of the U.S. Civil Rights Commission, *Helping Employers Comply with the ADA*, p. 64.

65. EEOC, *Priority Charge Handling Task Force, Litigation Task Force Report*, March 1998, p. 21.

66. U.S. Civil Rights Commission, *Helping Employers Comply with the ADA*, p. 64-65.

67. EEOC, Office of Legal Counsel, *FY1996 Annual Report*, p. 13-14.

68. U.S. Commission on Civil Rights, *Helping Employers Comply with the ADA*, pp. 232-240.

69. 119 S.Ct. 2139 (1999).

70. 119 S.Ct. 2133 (1999).

71. 119 S.Ct. 2162 (1999).

72. 29 C.F.R. pt. 1630 app. (commentary on §1630.2(h)).

73. *Compliance Manual* § 902.5.

74. Id. § 902.8.

75. In *Taylor v. Phoenixville*, 9 AD Cas. (BNA) 1187 (3d Cir. 1999), a seminal decision involving psychiatric disability, the court cited extensively to the reasonable accommodation section of this guidance.

76. Notice number 915.002 (Feb. 12, 1997), 8 Employment Discrimination Rep. (BNA) 253 (Feb. 19, 1997).

77. Id. at 253.

78. Id. at 255.

79. Id. at 255-58.

80. Id. at 255.

81. Id. at 258-60.

82. Id. at 260-61.

83. Id. at 261.

84. Id. at 261-62.

85. Id. at 262-63.

86. Id. at 263.

87. Id. at 263-64.

88. Id. at 264.

89. Id. at 261-62.

90. See, e.g., McNemar v. Disney Stores, Inc., 91 F.3d 610, 619-21 (3d Cir. 1996).

91. E.g., in Gonzales v. Garner Food Services, 89 F.3d 1523 (11th Cir. 1996), and in Parker v. Metropolitan Life Ins. Co., 99 F.3d 181 (6th Cir. 1996).

92. E.g., in EEOC v. CNA Ins. Companies, 96 F.3d 1039 (7th Cir. 1996).

93. *Parker*, 99 F.3d at 186; district court decision in *CNA Ins. Companies*, 5 AD Cases at 1767.

94. *Parker*, 99 F.3d at 186; *CNA Ins. Companies*, 96 F.3d at 1043-44; Leonard F. v. Israel Discount Bank of N.Y., No. 95 Civ. 6964, 1996 WL 634860, *2-*3 (S.D.N.Y. Sept. 24, 1996).

95. *CNA Ins. Companies*, 96 F.3d at 1045.

96. District court decision in *CNA Ins. Companies*, 5 AD Cases at 1766.

97. District court decision in *CNA Ins. Companies*, 5 AD Cases at 1766-67, citing: Henderson v. Bodine Aluminum, Inc., 70 F.3d 958 (8th Cir. 1995); Felde v. City of San Jose, 839 F.Supp. 708 (N.D.Cal. 1994), *aff'd*, 66 F.3d 335 (9th Cir. 1995); Schroeder v. Connecticut General Life Ins. Co., No. CA-93-M-2433 (D.Col. Apr. 22, 1994); Northen v. City of Chicago, 841 F. Supp. 234 (N.D. Ill. 1993).

98. *Gonzalez*, 89 F.3d at 1529; *CNA Ins. Companies*, 96 F.3d at 1043-44.

99. *CNA Ins. Companies*, 96 F.3d at 1045 (discussing retaliation charges). See, also, *Gonzales*, 89 F.3d at 1529 (appellant proffered argument, based upon EEOC Interpretive Guidance, that term "employee" in ADA should be interpreted as under Title VII).

100. 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999). The Solicitor's Office filed an amicus brief in the *Cleveland* case on behalf of the EEOC; the EEOC does not have the authority to file briefs in the Supreme Court on its own.

101. 29 C.F.R. §1630.2(j)(3)(i).

102. Id.

103. The regulatory guidance cites Forrisi v. Bowen, 794 F.2d 931, 932 (4th Cir. 1986); Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985); and E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980). 29 C.F.R. pt. 1630 app. (commentary on §1630.2(j)). The EEOC has been incredibly fixated on these three precedents, including the *Forrisi* court's serious misstatement of the ruling in *E.E. Black*, to the point of ignoring contrary court rulings.

104. S. Rep. No. 116, 101st Cong., 1st Sess. 24 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. pt. 2, at 53-54 (1990) (Education & Labor Committee). These reports cite Thornhill v. Marsh, 866 F.2d 1182 (9th Cir. 1989) and Doe v. Centinela Hospital, No. CV87-2514 PAR, 57 U.S.L.W. 2034, 1988 WL 81776 (C.D. Cal. June 30, 1988).

105. See, e.g., Richard A. Bales, *Once Is Enough: Evaluating When a Person Is Substantially Limited in her Ability to Work*, 11 Hofstra Lab. L. J. 203, 210-11 (1993); Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 Villanova L. Rev. 409 (1997).

106. 56 Fed. Reg. 35,728 (1991) (commentary on §1630.2(j)).

107. 29 C.F.R. pt. 1630 app. (commentary on §1630.2(j)).

108. Id.

109. *Compliance Manual* § 902.5.

110. 119 S.Ct. 2139 (1999).

111. 119 S.Ct. 2133 (1999).

112. 119 S.Ct. 2162 (1999).

113. Mathematica Policy Research, Inc., *Digest of Data on Persons with Disabilities* (Congressional Research Service, The Library of Congress, 1984), pp. 4-5. Based on statistics from the 1979 National Health Interview Survey, a figure of 43,783,000 was presented as the unduplicated total of persons with "impairments or chronic conditions." Id.

114. 56 Fed. Reg. 8593 (1991).

115. 56 Fed. Red. 35,728 (1991) (commentary on §1630.2(j)).

116. 29 C.F.R. pt. 1630 app. (commentary on §1630.2(j)).

117. Letter from Ida Castro, chairwoman of the Equal Employment Opportunity Commission, to Marca Bristo, chairperson of the National Council on Disability, April 12, 2000 (on file at NCD).

118. Id.

119. Id., § 1630.2(j)(2).

120. 29 C.F.R. pt. 1630, app. (commentary on §1630.2(j)).

121. In its proposed regulations for the implementation of Titles II and III of ADA, DOJ defined "disability" as "a *permanent or temporary* physical or mental impairment that substantially limits one or more of the major life activities of such individual ...." 56 Fed. Reg. 7482, § 36.104 (Feb. 22, 1991) (proposed regulation, Title III) (emphasis added); 56 Fed. Reg. 8551, § 35.104 (Feb. 28, 1991) (proposed regulation, Title II) (emphasis added). The identical definition was included by DOT in its proposed regulation to implement the transportation requirements of ADA. 56 Fed. Reg. 13879, § 37.5 (Apr. 4, 1991) (proposed regulation).

In the interest of interagency harmony, the DOJ dropped the words "temporary or permanent" from both sets of its final regulations. 28 C.F.R. § 35.104 (definition of "disability," Title II); 28 C.F.R. § 36.104 (definition of "disability," Title III). It explained that commenters had objected to the inclusion of this language "both because it is not in the statute and because it is not contained in the definition of `disability' set forth in the title I regulations of the [EEOC]." 28 C.F.R. pt. 35, app. A (commentary on § 35.104); 28 C.F.R. pt. 36, app. A (commentary on § 36.104). DOJ decided to delete the phrase from the final rule "to conform with the statutory language."Id. In its *Title II Technical Assistance Manual* and its *Title III Technical Assistance Manual*, DOJ explicitly rejected EEOC's rationale in the following identical language in each manual: "Are 'temporary' mental or physical impairments covered by [title II/title III]? Yes, if the impairment substantially limits a major life activity." *Title II Technical Assistance Manual* at 5, § II-2.4000; *Title III Technical Assistance Manual* at 11, § II-2.4000.

The Department of Transportation also agreed to delete the words "temporary or permanent" from its regulation in the interest of uniformity, 49 C.F.R. § 37.3 (definition of "disability"), but strongly rejected the exclusion of impairments that only limit activities temporarily. In the section-by-section analysis accompanying its final regulation, DOT declared: A few comments addressed "disability." Some suggested removing "permanent or temporary," suggesting that this language is unnecessary. The DOJ definition does not include these words, so we have deleted them for consistency. In our view, the terms are unnecessary because any condition that meets the criteria of the definition, *regardless of its duration*, is a disability. 49 C.F.R. pt. 37, app. (commentary on § 37.3) (emphasis added).

122. S. Rep. No. 116, 101st Cong., 1st Sess., 22 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. pt. 2, 52 (1990).

123. 42 U.S.C. § 12113(b).

124. 42 U.S.C. § 12111(3).

125. 29 C.F.R. §1630.2(r) (emphasis added).

126. 56 Fed. Reg. 35,730 (1991) (commentary on §1630.2(r)).

127. These are criteria for direct threat pursuant to 29 C.F.R. § 1630.2(r).

128. 485 U.S. 535 (1988).

129. 45 C.F.R. §84.11(c) ("a recipient's obligation to comply with this subpart [employment] is not affected by any inconsistent term of any collective bargaining agreement").

130. S. Rep. No. 116, 101st Cong., 1st Sess. 32 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. pt. 2, at 63 (1990) (Committee on Education and Labor).

131. 94 F.3d 1041 (7th Cir. 1996).

132. In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), Justice Powell, speaking for the Court, explained that civil rights claims are not subject to agreements to arbitrate or other collective agreements: "We think it clear that there can be no prospective waiver of an employee's rights under Title VII." Id. at 51. The Court distinguished civil rights claims from employment agreements, stating that "the primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike," and that incentive is not affected at all by civil rights claims. Id. at 54. See, also, Bowe v. Colgate Palmolive, 272 F. Supp. 332, 337 (S.D. Ind. 1967) (there is a "fundamental difference between a claim for the violation of a collective bargaining agreement and a claim for the violation of the Civil Rights Act of 1964"), *aff'd in part, rev'd in part on other grounds,* 416 F.2d 711 (7th Cir. 1969).

133. 44 F.3d 538 (7th Cir. 1995).

134. The Tenth Circuit relied heavily on this guidance in concluding that reassignment means more than the opportunity to compete for a vacant position, *Smith v. Midland Brake*, 9 AD Cas. (BNA) 738 (10th Cir. 1999) (en banc).

135. For example, it issued guidances regarding each of the following Supreme Court decisions: McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995); O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996); Walters v. Metropolitan Educational Enterprises, Inc., 519 U.S. 202 (1997).

136. 118 S.Ct. 2196 (1998).

137. Memorandum of Bill White, acting director, Office of Communication and Legislative Affairs, EEOC, May 4, 2000, p.4.

138. EEOC, *National Enforcement Plan*, p. 3.

139. Congress specifically authorized $13 million to support expansion of the mediation program in FY 1999; it is not yet apparent whether and to what extent additional funding is necessary for optimal operation of this program.

4.0 DEPARTMENT OF TRANSPORTATION

4.1 Introduction

This chapter addresses the enforcement of the Americans with Disabilities Act as it applies to publicly funded and privately funded transportation and transportation-related activities by the various operating administrations (or component subagencies, also called modal administrations) of the U.S. Department of Transportation (DOT).

DOT has several offices that have overarching authority across the entire department, including the Office of the Secretary (OST), the Office of the General Counsel (OGC), and the Departmental Office of Civil Rights (DOCR). Apart from these offices, however, DOT is an amalgam of separate, autonomous "operating administrations" or "modes," which function almost independently. Figure 4-1 displays this structure as an organizational chart. The operating administrations that have some sort of ADA responsibilities are the Federal Transit Administration (FTA), the Federal Highway Administration (FHWA), the National Highway Traffic Safety Administration (NHTSA), the Federal Aviation Administration (FAA), the Federal Railroad Administration (FRA), and the Coast Guard (USCG).

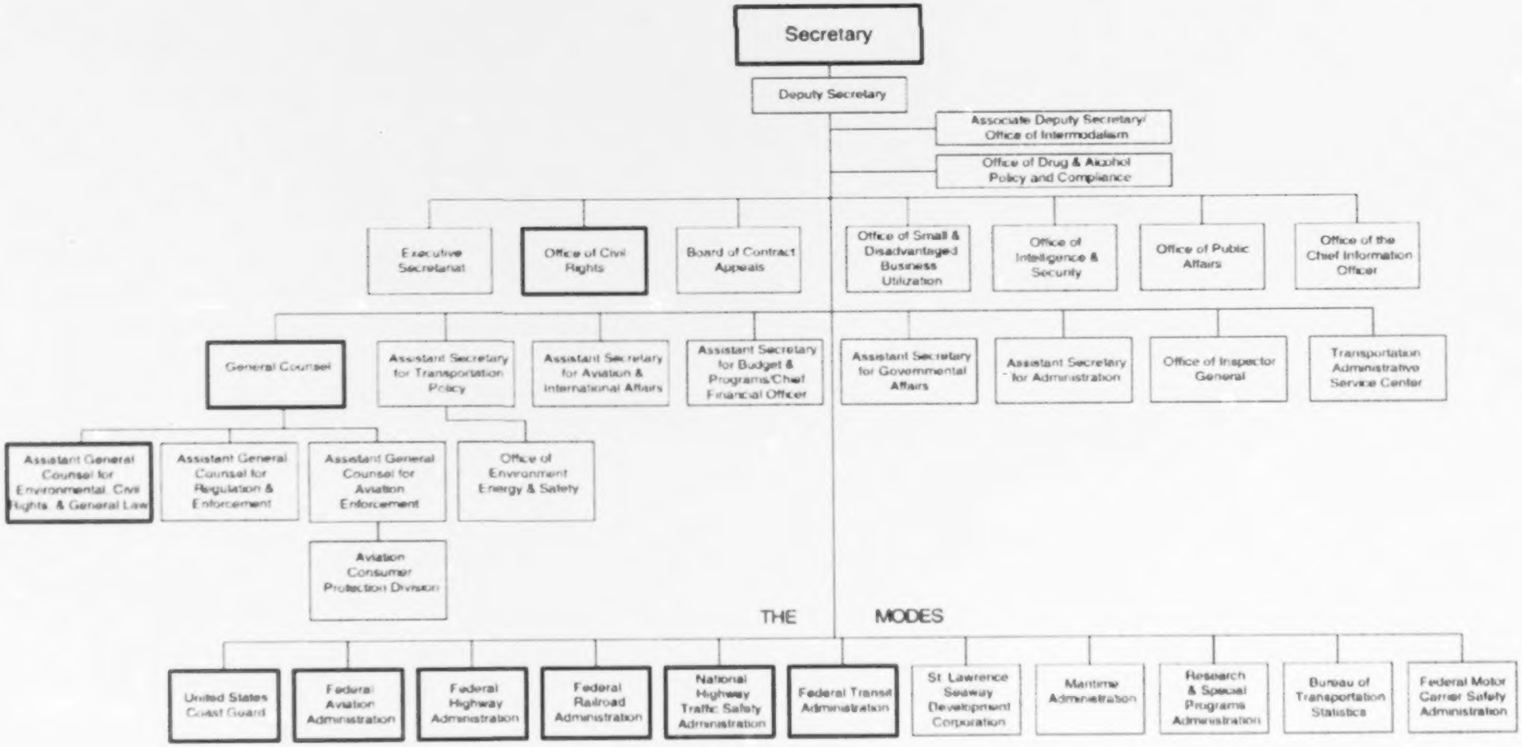
Regulatory standards for implementing ADA in its application to publicly funded transportation are established by DOT and enforced by the FTA. Regulatory standards for implementing ADA in its application to privately funded transportation are also established by DOT, but these are enforced by the Department of Justice (DOJ).

DOT has certain additional ADA enforcement responsibilities. The DOJ regulation implementing Title II of ADA allocates to eight federal agencies, including DOT, responsibility for enforcing ADA's requirements regarding state and local governments. Each of the eight agencies is required to investigate complaints about the components of state and local governments that exercise responsibilities in its subject matter area. Often the eight agencies receive complaints directly from complainants. If DOJ receives the complaint of discrimination, it refers the complaint to the appropriate agency. DOJ refers transportation-related complaints to DOT's Departmental Office of Civil Rights, which in turn refers them to the appropriate operating administration.

The sections that follow offer an analysis of each DOT operating administration that has a role in enforcing the ADA: the Federal Transit Administration, the Federal Highway Administration, the National Highway Traffic Safety Administration, the Federal Aviation Administration, the Federal Railroad Administration, and the Coast Guard.[1] Each operating administration has different strengths and weaknesses in its enforcement program. The chapter also includes a brief discussion of the DOJ's enforcement of ADA requirements applicable to transportation provided by private entities.

Figure 4-1

Organization Chart of the Department of Transportation


Secretary
Deputy Secretary
Associate Deputy Secretary/ Office of Intermodalism
Office of Drug & Alcohol Policy and Compliance
Executive Secretariat
Office of Civil Rights
Board of Contract Appeals
Office of Small & Disadvantaged Business Utilization
Office of Intelligence & Security
Office of Public Affairs
Office of the Chief Information Officer
General Counsel
Assistant Secretary for Transportation Policy
Assistant Secretary for Aviation & International Affairs
Assistant Secretary for Budget & Programs/Chief Financial Officer
Assistant Secretary for Governmental Affairs
Assistant Secretary for Administration
Office of Inspector General
Transportation Administrative Service Center
Assistant General Counsel for Environmental, Civil Rights, & General Law
Assistant General Counsel for Regulation & Enforcement
Assistant General Counsel for Aviation Enforcement
Office of Environment Energy & Safety
Aviation Consumer Protection Division
THE MODES
United States Coast Guard
Federal Aviation Administration
Federal Highway Administration
Federal Railroad Administration
National Highway Traffic Safety Administration
Federal Transit Administration
St. Lawrence Seaway Development Corporation
Maritime Administration
Research & Special Programs Administration
Bureau of Transportation Statistics
Federal Motor Carrier Safety Administration

Note: Boxes with dark outline have ADA enforcement responsibility.

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4.2 Federal Transit Administration

4.2.1 Background

The Federal Transit Administration manages federal funding programs to support mass transit systems in urban, suburban, and rural areas nationwide. Federal assistance for mass transit began in 1961 as a demonstration program under the Housing and Home Finance Agency. In 1964, the Urban Mass Transportation Act created what is now FTA to provide federal assistance to preserve the deteriorating public transit infrastructure in many American cities. Originally known as the Urban Transportation Administration, it was initially part of the Department of Housing and Urban Development (HUD). In 1968, the agency became part of the new U.S. Department of Transportation as the Urban Mass Transportation Administration (UMTA).

In the beginning, the federal transit program was administered primarily as a system of discretionary capital grants to repair and replace aging buses and rail systems that had endured a steady decline from 1946 to 1972. During that time, most transit systems in the United States were privately owned and operated. As the American landscape became more and more dominated by suburban development, highway construction, and an increasing reliance on private automobiles, transit ridership declined. Fewer riders meant less profit for the private transit companies and therefore less funding for service, repairs, maintenance, and expansion. UMTA established a buyout program that allowed public transit authorities to take over the privately owned transit infrastructure.

At the time the federal program was established, many systems had deteriorated almost to the point of collapse. The initial funding enabled many cities to buyout these private transit companies, operate their services under a public authority, and ultimately to invest in new equipment, rail system extensions, and entirely new rail systems. After the buy-outs were completed, UMTA continued to support the public transit infrastructure with funding for operating funds, rebuilding maintenance programs, and bus repairs. Funding was also provided for transit planning and research. A later funding phase focused on the acquisition of light rail mass transit.

Today, FTA funding is distributed to these public transit authorities, as well as other state and local agencies, through a number of discretionary and formula grant programs. The FTA grant program has grown to nearly $6 billion annually, which includes more than $2.5 billion for capital investments in bus and rail systems and more than $3 billion in formula grants.[2]

The earliest and an enduring fundamental purpose of FTA was to distribute public dollars to purchase equipment and build, operate, and maintain public transit systems. FTA (formerly UMTA) has never owned, operated, or managed any transit systems or services in the United States, but it has been responsible for ensuring their compliance with federal requirements, including the ADA regulations issued by DOT. Many of FTA's high-level program staff members have spent their long careers doing everything they could to assist transit agencies. And, for the most part, these same individuals are entrusted with the responsibility to implement and enforce the public transportation provisions of ADA.

FTA staffed and funded an unprecedented effort within its Program Management Office to provide technical assistance to the grantees for accessible vehicles and accessible services throughout the country. While this effort yielded significant national results in the purchase of accessible vehicles and the provision of service, it was accomplished by generally allowing broad flexibility in the interpretation and implementation of the DOT ADA regulations. The administration at the time justified this discretion in the interpretation of the law on the basis that each transit property is totally unique in funding, the makeup of its board, its previous efforts toward accessibility, the types of service it provides to the community, and the terrain and environment in which it operates. At the time it was thought that a "one-size-fits-all" strict interpretation of the regulations would result in stiff resistance and would be detrimental to the overall accessibility of the nation's transit systems.

From the perspective of many in the disability community, FTA's policy of broad flexibility has given transit agencies permission to place a low priority on ADA implementation. In the absence of a clear and strong expectation from FTA of timely compliance, many transit agencies have failed to take ADA implementation seriously enough.

In city after city, advocates have had to wage long battles for the basics: purchase and use of accessible buses, regular maintenance of bus accessibility features (especially wheelchair lifts), implementation of effective paratransit programs, and alteration of key stations in rail systems to provide access.

FTA's Program Management Office (FTATPM) was tasked with "implementation" of ADA because it was believed the staff understood the needs of the grantees. In FTA's view, FTATPM has been instrumental in making the transit community leaders in implementing ADA, as compared with other covered entities such as municipalities, counties, etc. However, although the equipment got on the road, there has been significant difficulty obtaining compliance with some of the most basic rights created by ADA. Moreover, this overall approach deemphasized the regulatory or enforcement powers of FTA, resulting in the impression that FTA was interested in serving only the needs of the transit properties. This impression caused a general distrust of the overall agency by the disability community, while the transit industry has persisted in the view that FTA's main purpose is to promote transit and to make grants.

Beginning in 1996, the responsibility for ADA and the enforcement of ADA was ever so slowly delegated to FTA's Office of Civil Rights (FTAOCR). The evolution from an office perceived as implementor (FTATPM) to an office perceived as regulator (FTAOCR) caused confusion and in some cases resentment among the transit properties and even in FTA. Throughout the years, as the implementation phase of ADA has been slowly replaced by the enforcement phase, the overall direction of FTA with regard to enforcement has evolved, albeit too slowly for many members of the public and the disability community and too quickly for some in the agency.

4.2.2 Organization of Enforcement

A number of units within FTA have a role in ADA implementation and enforcement, including the Office of Civil Rights, the Office of Program Management, the Office of the Chief Counsel, the Office of Planning, and the Office of Research, Demonstration, and

Innovation. Area field offices in the former (10) federal regions are also involved in a number of different activities related to ADA. This report is not organized by office, because many aspects of ADA enforcement cut across more than one office. For example, FTAOCR, the Office of the Chief Counsel, and sometimes the area field offices are all involved in the process of making decisions on or carrying out investigations of discrimination complaints. Therefore, this discussion is organized around the program areas or activities of FTA that relate to ADA, and it will evaluate all the FTA offices that are involved in the particular program or activity.[3]

4.2.3 Investigation of Complaints of Discrimination

FTA investigates complaints of discrimination under the Americans with Disabilities Act having to do with public bus systems, most passenger rail systems (including rapid, light, and commuter rail—everything except Amtrak), and ADA complementary paratransit. The headquarters FTAOCR handles the bulk of the processing of ADA complaints, unlike other operating administrations within DOT, such as the Federal Aviation Administration and the Federal Highway Administration, which send complaints to the area field offices for investigation.

For a number of years after ADA became effective, a significant backlog of complaints sat uninvestigated in the Department. FTA eventually addressed this backlog, using trained contractors, and made substantial progress clearing it. Clearing up the backlog brought with it difficulties inherent in attempting to address complaints that were up to five years old. Many complainants were not easy to reach and many of these complaints were quickly dismissed.

The 1996 *Report on the Department of Transportation Offices of Civil Rights*, prepared by the Office of the Assistant Inspector General for Inspections and Evaluations of DOT and covering the time period 1993-1994, found that "FTA had untrained interns investigating all ADA complaints" and that "FAA, FTA, and FHWA officials stated no ADA or Section 504 training was provided to the staff. This was a particularly stressful area to the staff since the Department had, at the time of our review, 626 ADA complaints to investigate and staff had no ADA or investigative training."[4]

4.2.4 Organizational and Procedural Improvements

In the three years between the publishing of the inspector general's report and the conclusion of the research period for the present report, a number of things have changed. FTA's Office of Civil Rights (FTAOCR), under its current director, has greatly increased the efficiency of complaint processing. Investigations occur relatively promptly and according to established procedures. The office deserves kudos for this important achievement.

In 1996, at the beginning of the director's tenure, approximately 270 ADA complaints were pending. With a significantly expanded ADA team, new procedures, and a computer tracking system, the 1996 backlog was soon eliminated, and FTAOCR continued to process and close on the average of 200 cases per year.

The newly appointed director also filled vacant staff positions, designated funds for external investigation, provided ADA training, and encouraged community outreach efforts within budget limitations. Outreach initiatives included the creation of a toll-free ADA telephone assistance line (the first at DOT), and an interactive Internet address. A complaint form is available on the FTA Web site.

FTAOCR's procedures now include an Initial Handling Unit and a Continuous Handling Unit. Internal guidelines for investigations appear to be followed with reasonable efficiency. The office closed on about 200 complaints each year in 1996, 1997, and 1998, clearing much of the backlog that had been there since 1991. Staff members make a concerted effort to be responsive to all complaints that came in, and staff interviews reflect a sense of caring on the part of the staff involved.[5] Part of this staff awareness may stem from the outspokenness of FTAOCR's director with regard to the importance of compliance with ADA.

Despite great improvement, FTA's complaint files still share some of the procedural gaps that exist in many of the other operating administrations of DOT. Many complaint files do not include a Report of Investigation with findings of fact, applicable sections of law, issues, and legal analysis. Most complaints requiring corrective action are closed without verification that the corrective action is taken, or, if such verification has occurred, that fact may not be reported in the complaint file. Past complaints that have been closed without monitoring of corrective action should be reopened for verification of whether the remedial steps were taken.

4.2.5 Content of Complaint Resolutions

Despite improvements in procedure, significant concerns arose from a random review of the content of complaint resolutions, as well as other information received on complaints. Researchers noted a number of overall trends, not in every complaint, but in significant numbers of them:

1. The use of the narrowest possible legal interpretations of the DOT ADA regulation;
2. Compartmentalizing problems one by one, seeing them as wholly separate, rather than assessing the situation systemically;
3. Taking the transit agency at its word rather than conducting an investigation;
4. Limiting interaction with the complainant and avoiding consultation with the disability community.

These trends add up to a situation of enforcement on paper alone, without taking forceful action against discriminatory practices. Although some individual problems receive minimal corrective action, overall enforcement activities do not look for systemic problems or pursue investigations of patterns of discrimination. No matter how significant the noncompliance, researchers found no evidence that FTA has ever imposed enforcement measures rigorous enough to correct the problem and to have real consequences for the transit agency. FTA's Office of Civil Rights does not bear the full responsibility for these enforcement deficiencies, to which other FTA offices and FTA's leadership also have contributed.

In an official response to a review draft of this report, FTA emphatically denies that a "trend" exists by which on-site investigations are not performed in ADA complaints. Instead, FTA sees its practices as with civil rights investigations at other federal agencies, where scarce resources demand setting priorities and spending investigative funds wisely. Not all investigations demand on-site work, and many include inquiries conducted by telephone and/or letter. Further, over the past few years, FTA maintains that FTAOCR and its director have increasingly looked for especially appropriate cases in which to invest the additional dollars required for an on-site investigation.

Cases selected for investigation have not been restricted to actual complaints filed with FTA. Instead, FTAOCR states that it has become involved with an eye toward systemic ADA problems. As a result, FTA has investigated on-site a number of transit systems across the country, including Raleigh, North Carolina; Salt Lake City, Utah; New York City; and Washington, D.C. Differing conclusions were reached on the issue of liability, but in Utah, for instance, substantial ADA problems were identified and remedied. After an on-site investigation in Raleigh, conducted in coordination with the Department of Justice, a few widespread problems were identified. In New York City, a complaint initially filed with FTA led to a lawsuit filed by the New York Public Advocate, resulting in a consent decree calling for sweeping changes in operations. (See the discussion at the end of section 4.2.6 on this complaint and its outcome.).

FTA's procedures seem to work satisfactorily in those situations where clear noncompliance is found with a regulatory provision that provides an absolute, bright-line standard. For example, DOT's ADA regulation requires that fares on publicly funded ADA complementary paratransit exceed no more than twice the fixed route fare for a similar trip. In one complaint about ADA complementary paratransit fares that were higher, FTA found "probable noncompliance," and the transit agency apparently changed its fare structure as a result. In a second example, ADA does not allow a transit agency to require certification of a service animal before allowing the animal's owner to take the animal on a bus. In response to a complaint in which a transit agency required service animal owners to demonstrate that the animals were licensed, FTA instructed the transit agency to revise its policy.

However, ADA, like many laws, does not always establish absolute, bright-line requirements. Rather, the ADA regulations include many general rules or principles that must be applied on a case-by-case basis to each situation. FTA's handling of another, more complex, complaint shows the narrow approach being taken. An individual eligible for ADA complementary paratransit complained of the many times he had tried to arrange for a paratransit ride the next day, almost always to be refused. ADA complementary paratransit rides appeared to be nearly unavailable, unless he called more than a week in advance. Though the ADA regulation requires next-day ADA complementary paratransit service, FTA accepted the transit agency's promise to improve its performance in the area of trip denials. The section of the ADA regulation addressing capacity constraints makes it illegal for a transit agency providing ADA complementary paratransit to limit the availability of service to eligible individuals by any operational pattern or practice that significantly limits the availability of service, including but not limited to substantial numbers of significantly untimely pickups, substantial numbers of trip denials or missed trips, or substantial numbers of trips with excessive lengths. The intent of this provision is to prevent ADA complementary paratransit vehicles from frequently being late, from requested trips frequently being denied (just as this complainant experienced), from vehicles frequently not showing up, or from trip lengths being extraordinarily long, in comparison to comparable rides on fixed-route buses. The capacity constraints provision is so important, and compliance with it is so poor, that capacity constraints constitute the most frequent type of complaint.[6] Thus, capacity constraints and how FTA handles them are critical issues.

At the start-up of its complaint-handling system, FTA would not make a finding of noncompliance with the capacity constraints provision unless there were complaints from several individuals rather than just one individual, even when the individual showed numerous instances of the problem happening to him or her, as the complainant mentioned above had. Further, FTA does not consider complaints submitted in a group by one person on behalf of others, because such complaints could be orchestrated by a single individual. FTA will only find noncompliance if there are multiple randomly submitted complaints.[7] Despite FTA's increased outreach to the public, it is not common knowledge among public transit or ADA complementary paratransit riders that one can complain to FTA. This greatly decreases the likelihood of the submission of several randomly submitted complaints against the same agency on the same issue.

FTA also noted that the restrictions of a paper- and telephone-based complaint process severely hinder an effective response to capacity constraint complaints. To counteract these limitations, the current process has slowly incorporated the use of specific compliance reviews to address capacity constraint issues The use of specific compliance reviews to address capacity constraint issues has recently been made public by the FTAOCR director and the FTA chief counsel.

FTAOCR reports that it has encountered the situation where a single complainant has filed a complaint "on behalf of" numerous other individuals without obtaining their permission. When the other named individuals were contacted by FTA, it was discovered that they had not given permission for use of their names, nor had they intended to file a complaint. To remedy this situation, FTA now requires each complainant or her or his authorized representative to file a complaint. In NCD's opinion, the basis for FTA's decision not to accept group complaints may not have been sound. For example, it is not clear how many complaints contained unauthorized signatures and what proportion of the total number of signatures was involved. Unless FTA was able to substantiate a pervasive problem, the decision represented an unwarranted presumption of bad faith on the part of those filing group complaints. The refusal to accept complaints filed on behalf of a group of individuals has imposed an unnecessary barrier to bringing situations involving possible systemic noncompliance to FTA's attention and obtaining corrective action sooner.

Since FTA requires more than one complaint be submitted to make a finding of noncompliance in the capacity constraints area, it would be sensible for FTA to track the complaints by transit agency over time. This would allow multiple complaints against a single agency to be determined, but researchers were told that data are not collected in a way that makes tracking this possible.[8] FTA requires multiple complaints to make a noncompliance finding, yet until recently it did not track complaints in a manner that would produce the required information. The current method used by FTAOCR to track ADA complaints is by jurisdiction and geographic location. On a monthly basis, the ADA team reviews these data to see if there are substantial numbers of complaints from one geographic location. Another new practice is to assign multiple complaints arising from one of the larger transit properties to one investigator in order to identify patterns of conduct.

Furthermore, in response to a complaint about a pattern of late pickups on ADA complementary paratransit, FTA quoted a DOT inspector general's report on one city's ADA complementary paratransit system, which disclosed that about 30 percent of the trips were between one and five hours late. FTA acknowledged that such a situation would constitute a violation of the capacity constraints provision. FTA added that if there were only a few instances of trips one to five hours late, or many instances of trips a few minutes late, this would not constitute capacity constraints. Individual complainants, however, are not in a position to offer documentation of the overall rates of compliance.

FTA's earliest advice to grantees in implementing ADA complementary paratransit was not to consider it to be a violation of the capacity constraints provision if the service problem (lateness, denials, etc.) did not happen to the same person. This advice appears to have had a significant impact on the quality of paratransit service as it evolved.[9] It is widely acknowledged, and has been confirmed by the ADA Paratransit Compliance Study, that some cities have transit agencies with very significant patterns of capacity constraints.[10] In these cities, eligible riders are routinely denied the rides they request, like the rider who complained in the example. In other cities, extreme lateness is very common. Yet FTA has yet to make a noncompliance finding in this area, because it has applied a narrow interpretation to the capacity constraints provision.[11]

Another complaint involved a sheltered workshop that received a contract for ADA complementary paratransit and used the funds only to transport its clients to its workshop, denying rides to all other callers. The complaint was dismissed. FTAOCR's response to a protest from advocates was that the regional office (now an area field office), that had conducted the investigation found no discrimination.[12]

Many other complaints of discriminatory behavior by bus drivers (including retaliation against passengers with disabilities who had complained about transit service, refusing to stop and pick up wheelchair users, and requiring written documentation before allowing transit of a service animal with its owner) were dismissed by FTA on the basis of statements from the transit agency that the driver was no longer with the agency or that the driver had been disciplined. In many instances, there is no documentation of corrective action. Additionally, the failure to examine the complaints from a broad or systemic perspective raises the possibility that the same driver, or other drivers similarly untrained, may be acting similarly in other situations. There was nothing in the documentation provided to indicate that FTA conducted further investigation for a pattern of discrimination on any complaint. FTA denies that these findings are accurate, maintaining that FTAOCR inquires when investigating whether a single driver has a history of discipline for past offenses and whether the driver received additional training as a matter of practice. Moreover, FTAOCR says that it has performed extensive compliance reviews that addressed systemic problems by bus drivers, including those in New York City; Milwaukee, Wisconsin; and Salt Lake City, Utah.

In one group of complaints submitted by several riders in the same city, part of the problem at issue was that the riders were transferred without their knowledge from standard paratransit service to a fixed-route deviation service. FTA dismissed their claim of being transferred without their knowledge by stating that the transit agency had reported that it notified everyone by mail. No further investigation on this point was made. This pattern is repeated in many other complaints: a denial by a transit agency of discriminatory action is frequently the basis for dismissal of a complaint, with no further investigation. Even if resources have not been available to conduct in-depth investigations on every complaint, there is no evidence that FTA ever conducted a thorough investigation of such situations in other ways, such as through phone calls or letters.

A review of more recent complaint findings revealed that FTA is asking transit agencies somewhat more often to review a policy or correct a problem. For example, in one complaint about frequent wheelchair lift breakdowns and bus drivers who refuse to help with wheelchair securement or who secure wheelchairs incorrectly, FTA directed the transit agency to address these difficulties, pointing out the regulations' requirements for bus lifts to be kept in operative condition or to be removed from service and advising the agency to monitor its drivers for adherence to ADA requirements for proper assistance. However, even in the more recent findings, the basic problems already described continue. FTA is reluctant to enforce the law when the consequences to the transit agencies are significant. Too often, the response to noncompliance, even egregious noncompliance, is a pat on the head and "Let us help you do a little better." As one critic of FTA put it, "The punishment for speeding is 'Go slow the next time'."[13] Consistent with FTA's reluctance to take a strong enforcement position in resolving complaints with a finding of noncompliance is the fact that at the time research for this report was conducted, DOT had never referred any findings of discrimination resulting from an ADA complaint to the Department of Justice for litigation. This was true despite the best efforts of DOJ. Mindful of the ongoing difficulties in implementing the transportation requirements of ADA, DOJ has stated for several years its interest in pursuing litigation in the area of public transit. DOJ staff members have spent considerable time with staff members from DOT and FTA toward this end, yet nothing had been referred.[14] FTA staff members have commented informally on their unwillingness to refer complaints to DOJ because it conflicts with FTA's mission, which is to support the transit agencies.[15]

In official comments on the review draft of this report, FTAOCR commented that this picture has changed. FTA emphasizes that it operates in accordance with the regulatory requirement to seek cooperation of recipients in securing compliance and to provide assistance and guidance to recipients to help facilitate compliance, before taking harsher action such as sanctions or making a referral to DOJ. In addition, FTA has worked to create a good relationship with DOJ so that the ADA referral mechanism, when needed, is an efficient one. Since 1998, staff from FTA, DOT, and DOJ have met on a number of ADA matters to discuss joint investigative work, potential referrals, and the hiring of an expert witness in a complex transit case. In addition, FTA has referred ADA matters to DOJ for enforcement. In San Francisco, California, FTA staff encountered lack of voluntary cooperation by transit officials concerning ADA key station compliance and referred the matter to DOJ for enforcement. (NCD is unaware of any referrals to the Department of Justice other than the 1994 San Francisco case.) Moreover, on a regular basis, staff at FTA make contacts with DOJ attorneys across the country to report ADA compliance problems. In a recent example, when an FTA attorney learned of ADA violations involving visually impaired persons and temporary bus stops in South Bend, Indiana, he referred the matter to the relevant DOJ attorney in that area. In another recent case, FTA staff and DOJ staff conducted a joint investigation in Salt Lake City, Utah, on ADA issues. They agreed that the case was not an appropriate one for referral, but it would have been had the investigation revealed different results.

4.2.6 Compliance Reviews, the Milwaukee County Voluntary Compliance Agreement, and New York City

FTA has authority to conduct compliance reviews in response to complaints that are filed, but has done so only once, in Milwaukee County, Wisconsin. There, the disability community was taking many steps to resolve numerous extreme ADA complementary paratransit difficulties, including lack of next-day service; limitations on the service area; and widespread and significant capacity constraints, including a very high trip denial rate, excessive trip lengths, and late pickups. In addition to filing a lawsuit, individuals with disabilities filed a significant number of complaints with FTA. FTA conducted a compliance review that resulted in a voluntary compliance agreement (VCA) between FTA and Milwaukee County. In the interim, the Wisconsin Coalition for Advocacy (WCA) had filed a lawsuit on the same issues. The FTAOCR director viewed the VCA as a significant positive contribution to bettering the overall situation. He characterized the inclusion of the VCA into the consent decree, which temporarily settled the lawsuit, as an agreement, which included input from the disability community, furthered resolution of the problems, and improved transit service in Milwaukee County. In fact, he stated that the disability community "picked the terms" from the VCA for inclusion in the consent decree, although the disability community did not have the opportunity to participate in the creation of the VCA.[16] FTA later conceded that VCAs were never intended to include input from the disability community, which is one of the reasons they are no longer in use.

However, several leaders in the disability community in Milwaukee County disagreed, noting significant problems with the VCA process, its failure to ameliorate the problems, and FTA's refusal to consider input from any source other than the transit authority. Researchers contacted several leaders in the disability community in Milwaukee County, and Mike Bachhuber, Esq., of the Wisconsin Coalition for Advocacy sent a written statement, excerpts of which follow (see Appendix E for the complete statement).

> FTA relies almost entirely upon self-reporting to determine if its grantees comply with ADA....It was hard to give much credibility to the agency in light of [this]. The lack of credibility was aggravated by statements from various FTA staff that they are not an enforcement agency, despite the fact that the ADA makes them an enforcement agency....
>
> The FTA sent form letters to notify complainants that their complaints were assigned to the (then) regional office. No follow-up was done to see if the complaints were resolved. When I called to follow one complaint, I was told that the VCA process was the entire agency response to the complaints. This caused a greater loss of confidence in the agency.
>
> The VCA was negotiated between FTA and Milwaukee County. No opportunity was given to complainants, the disability community or others to have a voice in that process.
>
> Despite the fact that various organizations in the disability community had contacted FTA regarding problems, the FTA relied solely on Milwaukee County's position.[17]

Bachhuber, in an interview, explained that FTA never initiated a single contact with a complainant or anyone else in the disability community.[18] The only interaction that occurred was a meeting in autumn 1997, initiated and organized by a disability organization, the Wisconsin Coalition for Advocacy. At and after that meeting, people in the disability community asked to be kept up to date and included in discussions. The only response they received were questions about the appropriateness of having outside parties involved. Bachhuber's statement also explained that Milwaukee County said it could not provide ADA complementary paratransit service that crossed county lines for statutory reasons, even though the disability community conducted a thorough legal analysis, supported by examples of transit in the same area, that indicated the contrary.[19] FTA, based on its own legal analysis, concurred with Milwaukee County's conclusion.

Bachhuber's statement concludes, "The VCA itself primarily consisted of milestones in redesigning, letting and implementing contracts for the van service. Each of the milestones was met. However, universal access to next-day service is still not available. Excessive trip lengths, late pick-ups and other capacity constraints are still common. We have been told the FTA area field office recommended closing the enforcement file concerning Milwaukee County based solely upon the County's self report. Again, complainants and other interested parties were not contacted nor was any independent investigation done [to monitor compliance with the VCA]....The FTA should also be required to do better follow-up with complainants. Those who have taken the effort to raise a complaint...should receive the courtesy of follow through."

Several themes emerge from this compliance review, which appear to be typical of FTA enforcement efforts agencywide. FTA staff members undercut FTA's ability to enforce by making disclaimers about its enforcement power, practice, and history and by failing to get back to complainants as to the disposition of the complaint. Even in a compliance review, FTA communicated exclusively with the covered entity to the exclusion of interactions with the complainants or relevant parties in the disability community. FTA took the word of the covered entity, even when it came to important findings of fact and conclusions involving state law. Perhaps most important, the milestones that constituted the content of the VCA itself consisted of measures that could be reached without resolving the underlying problems plaguing the transit system, problems that were the subjects of the complaints. The determination of whether VCA milestones were reached was made only in consultation with the covered entity, with no outside verification by investigation or by consultation with another party.

What happened in Milwaukee is not an isolated example: a similar situation is brewing in New York City. Considerable attention in the transit world has been directed at New York City because of the submission to FTA of an extensive set of complaints covering many riders' concerns by New York's Office of the Public Advocate about significant capacity constraints on ADA complementary paratransit. The problems include a very high denial rate (the transit agency admitted a policy of 6 percent allowable denials, known as a fixed denial rate), large numbers of extremely late vehicle arrivals, frequent occasions where vehicles did not arrive, and frequent overly lengthy trips.

FTA's initial actions gave the complainants some cause for hope. Within a month of the April 1998 filing, complainants received a letter stating that a fixed denial rate is likely to be discriminatory (although nothing was stated about the transit agency's violations of the capacity constraints service criterion). A few months later, in autumn 1998, FTA sent a consultant to conduct a compliance review. This consultant was perceived by involved members of the disability community as biased in favor of transit providers, on the basis of remarks he had made in hearings and other venues, and other history.[20] Moreover, FTA staff members made statements to the transit agency that it need not worry about serious consequences coming from FTA's efforts, despite the public statements of FTAOCR's director to the contrary.[21]

In the eight months following the consultant's visit, individual complainants maintained that they were not getting responses to their inquiries at FTA. FTA staff, however, reported ongoing communication between FTA and the Public Advocate's Office on this matter, including several letters. Several compliance assessment reports were prepared, a conference call was conducted, and FTA was involved with settlement negotiations. The transit agency did take steps, including establishing a free telephone line (a response to 20-minute holds when people called about late vehicles), making a long-needed budget increase, and ordering new vehicles. Despite these actions, FTA apparently made no determination about the alleged numerous and serious violations of the capacity constraints service criterion. Information from the Office of the Public Advocate for the City of New York indicated that the service problems continued unabated in New York's ADA complementary paratransit service.[22]

There are many places across the country like Milwaukee County and New York City, including Salt Lake City, Utah, and San Antonio, Texas. They face enormous difficulties in reaching ADA transportation compliance in the absence of strong enforcement by FTA. When FTA fails to speak in one voice, from the program staff to the grant representatives to FTAOCR, the disability community is left with the justifiable impression that people with disabilities must rely on their own resources to fight pervasive, systemic discriminatory practices because of what they view as FTA's negligence.

4.2.7 Findings and Recommendations

Finding 40: FTAOCR, under its current leadership, has greatly increased the efficiency and procedural consistency of complaint processing. More public outreach efforts have also been instituted.

Finding 41: FTA complaint processing is still flawed in many areas. Understaffing, underfunding, and restrictions on the use of oversight funding for investigation of complaints have contributed to the problems cited below:

- Complaint files are closed without monitoring that corrective action has been taken and often do not include a report of investigation with findings of fact, legal analysis, or indication of the applicable sections of the law.
- Numerous complaints must be filed on ADA complementary paratransit capacity constraints to cause an investigation and finding of noncompliance.
- Investigation never involves a site visit or consultation with persons or organizations other than the transit agency against which complaints have been filed. While FTAOCR receives funds for assessments, it receives no funds for complaint investigation.

- FTA resolutions tend toward (1) the narrowest possible legal interpretation of the DOT ADA regulation; (2) considering the problem in isolation rather than looking at the situation systemically; (3) taking the transit agency at its word rather than conducting an investigation; and (4) interacting very little with the complainant and failing to consult with the disability community.
- FTAOCR has been given no additional FTEs since responsibility for the enforcement of the ADA transportation provisions was delegated in 1996.

Recommendation 47: Congress should adequately fund ADA enforcement activities to ensure the staff and other resources necessary for thorough follow-up on complaint handling, evidence of systemic violations derived from complaint data, and for conducting compliance reviews. Administrative restrictions on the use of oversight funds for complaint investigation should be removed.

In FY 2000, ADA key station assessments were funded at $350,000, and ADA complementary paratransit and fixed-route assessments were funded at $250,000 each. FTA was provided approximately $500,000 in additional funds to conduct fixed-route and paratransit compliance reviews. No funds were allocated for complaint investigation, and the use of oversight funds for complaint investigations is prohibited according to the inspector general's report. Given this funding situation, investigation of complaints continues to be a paper- and telephone-based process. Unlike DOJ, which has a separate staff to respond to complaints and to provide technical assistance to the transit entities, FTAOCR uses investigators in rotation. In contrast, triennial reviews, which are mandated and annually funded by statute as an oversight activity, received a total of $3,490,000 for FY 2000.

Recommendation 48: Each complaint file should include a Report of Investigation with findings of fact, applicable sections of law, issues, and legal analysis. No complaint requiring corrective action should be closed without verification that the corrective action is taken, and this verification should be included in the complaint file.

Past complaints, closed without follow-up monitoring, should be reopened to verify whether corrective action agreed to by the transit authority was actually taken.

Recommendation 49: FTA should continue to improve its methods for tracking complaints in a manner that allows the analysis of patterns of practice in particular transit agencies as well as across the country as a whole.

FTA should continue making improvements to its current tracking system that allow identification of patterns of conduct, such as their current monthly review to detect patterns of noncompliance by tracking the number of occurrences of similar complaints arising from a single transit property.

Finding 42: Compliance reviews are seldom performed.

In the one compliance review on which NCD received information, it appeared that FTA's methodology for compliance review relied too much on self-reporting from the covered entity and on communication exclusively with the transit agency, and too little on information provided by complainants and the disability community.

Recommendation 50: The tool of compliance reviews should be used for ADA fixed-route and complementary paratransit situations where there appear to be significant ADA compliance problems.

FTA has recently begun conducting such compliance reviews for fixed-route and ADA complementary paratransit. FTA just completed its first group of compliance reviews at various sites across the country, and an additional nine reviews are now beginning under a new contract.

Recommendation 51: Except in rare circumstances, FTA investigations should probe beyond the self-reporting of the transit agency. Investigations conducted as part of compliance reviews should involve more interaction with the disability community, particularly in large systemwide investigations.

FTA should conduct some site visits and spot checks. These activities should be funded adequately. Examples of when the disability community should be consulted include determination of whether compliance review milestones are reached or whether systemwide corrective actions have been implemented. Investigations should never be closed without follow-up on problems noted by the disability community.

Finding 43: No matter how significant or egregious noncompliance is, FTA has not imposed the kind of rigorous enforcement measures that would ensure that transit agencies correct the ADA violations.

FTA maintains that compliance efforts can be highly effective and efficient in bringing about ADA compliance. In its view, informal means such as voluntary compliance agreements are used throughout the Federal Government by agencies with oversight responsibilities, including civil rights. More rigorous enforcement measures should be used only when compliance cannot be achieved by other means. FTA has persisted in the use of informal measures to obtain compliance long beyond what can be considered a reasonable time frame in many instances. The FTAOCR does not bear the sole responsibility for these problems, to which other FTA offices and FTA's leadership also have contributed.

Recommendation 52: FTA enforcement should involve more substantial consequences for transit agencies that violate ADA. FTA should develop objective criteria defining degrees or forms of noncompliance by transit agencies that will trigger specific types of sanctions among a range of such sanctions of varying degrees of severity, including significant sanctions for transit agencies with serious, ongoing compliance problems.

Referral to the Department of Justice for litigation and holding up federal funds, or a portion of them, until compliance is achieved are among the consequences FTA can use to secure compliance.

Recommendation 53: When FTA uses consultants to conduct investigations, it should select only individuals or organizations who are viewed as fair and impartial by all parties.

In situations involving significant ADA compliance problems, the investigator should engage in extensive communication with the complainants and with the disability community.

Finding 44: At the time research for this report was conducted, DOT had never referred any findings of discrimination resulting from an ADA complaint to the Department of Justice for litigation.

Recommendation 54: FTA should continue to identify appropriate cases of noncompliance to the Department of Justice and cooperate fully in developing ADA transportation cases for litigation.

Recommendation 55: FTA should issue subregulatory guidance requiring transit agencies to display notices prominently in all vehicles used by transit systems notifying

riders, in a format that is culturally competent for their ridership, that discrimination complaints can be made to the transit systems and to FTA.

Notices should include the FTA address and phone number. Transit agencies should also be required to notify all people who complain to them about problems with accessible service that complaints can be made to FTA.

4.2.8 ADA Complementary Paratransit Plan Review

From February 26, 1992, until January 26, 1997, FTA also had responsibility for reviewing ADA complementary paratransit plans submitted by transit agencies. The ADA regulations required any transit agency providing fixed-route service to provide complementary paratransit to people who, because of disability, cannot use the fixed-route service. Eligibility provisions explain who is eligible for the service, establish safeguards in the eligibility determination process, and establish service criteria that must be met to ensure the quality of the service. Every transit agency required to provide complementary paratransit was also required to submit to FTA on February 20, 1992, a paratransit plan detailing how it would come into compliance with these requirements and to begin implementation of the plan. Transit agencies were also required to submit a detailed plan update on February 26 of each year and to complete implementation of the plan (that is, to be in full compliance with ADA's paratransit requirements) by February 26, 1997.

The ADA statutory language and regulations, anticipating that providing complementary paratransit service in compliance with all the ADA requirements could be difficult in some cities, included a provision that transit agencies could apply to FTA for a waiver based on undue financial burden (UFB). Later, FTA clarified its UFB policy to allow the granting of time extensions (not waivers) for coming into full compliance if undue financial burden was found. FTA conducted review and approval of the ADA complementary paratransit plans through the five-year implementation period, making extensive use of contractors and the area field offices, with direction from FTA's headquarters, particularly the Office of Program Management, formerly Grants Management.

The disability community had hoped that the submission of ADA complementary paratransit plans to FTA would constitute an opportunity for real monitoring of local progress and that FTA would take action to ensure that transit agencies were in compliance with their plans. In some cities, people with disabilities were not happy with the plans submitted by their transit agencies or believed the plans did not reflect the true situation of ADA complementary paratransit service. In interviews, FTA staff members emphasized that they perceived their jobs were to ensure that transit agencies were in compliance with the requirement to submit the written plans, not to monitor actual ADA complementary paratransit service or verify compliance.[23] In official comments on the review draft of this report, FTA maintains that substantive review of content did occur at the cost of almost $2 million and that FTA recommended changes to those submitting plans. The comments did not indicate whether verification took place to determine whether the changes were, in fact, made.

Consistent with its past policy of not consulting with the disability community on VCAs, FTA also did not consult the disability community about ADA complementary paratransit plans, even though extensive disability community participation is a requirement in the plans. FTA's ADA complementary paratransit plan contractors learned about what transpired in the required public hearing by reading the transit agency's descriptions of it. Contractors were not encouraged to make contacts with disability representatives to get other views; instead, they were told to require additional information from the transit agencies if necessary.[24] FTA's contractors examined the plans closely to be sure the submitted statistics were reasonable and to try to detect any attempts to obfuscate. FTA and its agents made little effort to otherwise ascertain the veracity of ADA complementary paratransit plans and did not undertake a program to spot-check whether transit agencies were in compliance. This does not appear to be the result of a lack of resources. No staff person ever expressed the desire to do these things. FTA has not identified its role in a manner that produces genuine monitoring of ADA complementary paratransit service.

Pursuant to the ADA regulation, once a transit agency's complementary paratransit plan is approved, if paratransit service included in the plan is not provided in accordance with the plan, the transit agency is violating ADA. What a transit agency claimed in its ADA complementary paratransit plan should be an extremely important compliance tool, because it was, and continues to be, typical for transit agencies to view their paratransit services as in compliance with ADA. People with disabilities in local communities often have very different views. A significant divergence of views between the disability community and transit agencies about how well paratransit services comply with ADA was documented in the ADA Paratransit Compliance Study.[25]

In 1996, DOT issued a final rule that changed the ADA complementary paratransit plan requirement. Once a transit agency had achieved compliance with ADA's paratransit requirements, the agency was no longer required to submit a detailed ADA complementary paratransit plan, despite the fact that local disability communities often used the paratransit plan process as a way of ensuring disability involvement with the transit agency and assessing the actual progress of the transit agencies to meet their implementation and compliance goals. This fact was acknowledged by FTA in interviews.[26] Instead of the detailed ADA complementary paratransit plan submitted annually, DOT now only requires a very short statement of self-certification that a transit agency's complementary paratransit service is in full compliance with ADA.

By 1997, FTA was receiving very few applications for time extensions based on UFB. Many observers in the transit field noted that transit agencies, compliant or not, have little incentive to apply for a time extension when submission of a short self-certification of compliance satisfies FTA.

4.2.9 The ADA Complementary Paratransit Problem

People with disabilities continue to experience significant service problems with ADA complementary paratransit in many cities. Interviews with various FTA staff members revealed negative attitudes toward ADA complementary paratransit. Interviewees identified a variety of different parties as responsible for the difficulties surrounding the implementation of ADA complementary paratransit, although the staff and the disability community did not view the difficulties in the same way.

For many on staff at FTA, ADA complementary paratransit is viewed as burdensome to the transit agencies, and thus ADA itself is blamed for the paratransit problem. For example, one interviewee referred to the "infinite" number of elements that have been added to the compliance list, creating huge burdens on grantees. He emphasized that FTA is a transit agency, not a civil rights agency, and he explicitly referred to ADA as an unfunded mandate.[27] Another interviewee who was present at this interview responded by noting that the FTA administrator says ADA compliance is part of FTA's mission.[28]

FTA staff members also appear to blame the ADA complementary paratransit problem, at least in part, on the Department of Health and Human Services (HHS).[29] There have been efforts by FTA to work with HHS, since many HHS programs affect paratransit in communities across the United States. HHS's perceived lack of cooperation has become something of a scapegoat for some in FTA.

FTA staff interviews also suggested another target for responsibility for the ADA complementary paratransit problem: there was sometimes an undercurrent of blaming the riders themselves for using the service.[30] Transit agencies, FTA, and national disability advocates share the frustration that many people with disabilities who could use fixed-route transit prefer to ride ADA complementary paratransit. However, it is still noteworthy that some leading FTA staff persons do not view it as inappropriate to place blame on the riders themselves. Only one person who was interviewed, the FTAOCR director, put the issue into an accurate historical perspective. He commented that the transit industry's long resistance to complying with Section 504 of the Rehabilitation Act of 1973 has led to the present problems with ADA complementary paratransit. If public transit systems had been made fully accessible in accordance with the regulations implementing Section 504, the post-ADA demand for ADA complementary paratransit would not be as great.[31]

Some disability advocates from ADAPT have long argued that, instead of ADA complementary paratransit plans, DOT should have required "ADA plans" that would have included information on progress toward compliance with ADA's fixed-route requirements as well as those for paratransit.[32] If DOT had done this, more attention would have been directed to monitoring each transit agency's fixed-route access. Such an approach could have played a strong role in emphasizing the importance of fixed-route transportation. Establishing such a policy at the subregulatory level was well within the purview of FTA. Despite the disdain of some FTA staff persons for the ADA complementary paratransit "burden" on transit agencies, this policy was never established.[33]

4.2.10 Findings and Recommendations

Finding 45: FTA conducted ADA complementary paratransit plan review and approval through the five-year implementation period of ADA paratransit between 1992 and 1997. FTA staff members perceive that their responsibility is to ensure that transit agencies are in compliance with the requirement to submit the written plans, not to monitor actual ADA complementary paratransit service or verify compliance.

DOT now requires only a very short statement of self-certification that a transit agency's ADA complementary paratransit service is in full compliance with ADA. Transit agencies tend to submit this self-certification even when they are not in full compliance, as no monitoring takes place.

Recommendation 56: FTA should require transit agencies to submit ADA plans that include detailed reports on progress toward compliance with ADA's fixed-route requirements, along with ADA complementary paratransit compliance. FTA should monitor agencies' performance of both fixed-route and ADA complementary paratransit compliance by conducting compliance reviews and making use of site visits and spot checks, instead of relying exclusively on self-certification.

Increased emphasis on fixed-route transit will address inadequacies of fixed-route service and help to improve such service for passengers with disabilities. This will not only enhance the transit experience of current users of fixed-route services but will help to encourage the use of such services by nonusers, including persons who currently rely on ADA complementary paratransit services. Compliance oversight should include investigation of the training and performance of bus drivers, including their willingness to help passengers with disabilities board and exit, to call out streets and destinations for passengers who are unable to see them, and to perform other services necessary for passengers with disabilities to make effective and equal use of bus service. Oversight of ADA complementary paratransit compliance should include careful review of detailed ADA complementary paratransit plans and conscientious FTA monitoring of actual performance, including procedures for arranging rides, rate of trip denials, conformance with scheduled pickup times, and length of ride-times.

4.2.11 Key Station Compliance

The Americans with Disabilities Act transportation regulations include extensive requirements regarding rapid rail, light rail, and commuter rail, all enforced by FTA. (The ADA requirements for the only other type of passenger rail in the United States, Amtrak, are enforced by the Federal Railroad Administration). These requirements include rules on new and existing rail cars. New rail stations are required to be accessible. For existing stations, transit systems were required to develop a plan designating key stations, based on which stations have the highest rate of passenger boardings, which are transfer stations and major interchange points with other transportation modes, which are end stations, and which serve major activity centers. In developing key station plans, rail agencies were required to engage in an extensive public input process, including a public hearing, with significant involvement by the disability community. Key stations were required to be accessible by July 1993. The regulations state that this time limit was extendible by DOT for up to 30 years (for rapid and light rail) or 20 years (for commuter rail) if a key station would require extraordinarily expensive structural modifications to achieve accessibility, such as the installation of elevators, the raising of an entire train platform, or alterations within a station of similar magnitude and cost

FTA reports that 689 rapid, light, and commuter rail stations in the United States are designated as key stations.[34] FTA granted time extensions to 19 key stations, which are part of six transit agencies. Since large numbers of the other stations were not in compliance by the deadline, FTA established voluntary compliance agreements detailing when and how compliance would be achieved. Establishment of the VCAs included a process of hiring contractors who surveyed all key stations.

In a memo dated March 16, 1998, the Office of Civil Rights outlined the status of key station compliance in 33 transit systems, based upon an assessment of stations performed under contract by an outside consultant and by transit system self-certification. Table 4-1 and Table 4-2 are derived from data contained in the memo and from summary data from the FTA key station surveys as of February 1998. Table 4-1 shows that 38 percent of key stations were rated in compliance, with another 26 percent not in compliance but operating under a valid time extension or voluntary compliance agreement. The remaining 36 percent of key stations had expired agreements or extensions; in the case of 173 stations, the agreements had been expired for two or more years. Transit systems have varying numbers of key stations; for some systems, many key stations were out of compliance, while for others, only a small number failed to meet the ADA standards. Table 4-2 rates the overall inaccessibility of a transit system in terms of the percentage of its key stations that were out of compliance. This table shows that as of March 1998, 42.2 percent of transit systems were rated inaccessible, meaning that none of their key stations were in compliance with ADA. Nearly one-third of the transit systems did have at least 75 percent of their key stations in compliance with ADA.

Table 4-1

Compliance Status of Key Transit Stations

February 1998

Status of Station Compliance	Number of Stations	Percentage of Stations
Presently valid TE or VCA	179	26
Expired TE or VCA, 1-23 months since expiration	74	11
Expired TE or VCA, 2-3 years since expiration	124	18
Expired TE or VCA, >3 years since expiration	49	7
Stations in compliance	263	38
Total stations	689	100%

Note: Stations were audited on 14 elements. The cells show the number of stations with any time extension (TE) or voluntary compliance agreement (VCA). Some stations may have more than one element that is the basis of a TE or VCA. Count does not include new stations.

Table 4-2

Level of Transit System Accessibility, February 1998

Level of Transit System Accessibility	Number of Transit Systems	Percentage of Transit Systems
Inaccessible (0% of key stations in the transit system in ADA compliance)	14	42.2
Largely inaccessible (<25% of key stations in the transit system in ADA compliance)	2	6.1
Somewhat inaccessible (25%-50% of key stations in the transit system in ADA compliance)	2	6.1
Somewhat accessible (51%-75% of key stations in the transit system in ADA compliance)	5	15.2
Largely accessible (>75% of key stations in the transit system in ADA compliance)	10	30.3
Total transit systems	33	100.1%

Source: Key station survey summary data, FTA, Department of Transportation, 2/98. Author calculation.

The assessment of key station ADA compliance was based on compliance in 14 areas, called key elements. The elements are parking/drop-off, accessible route, curb ramp, entrance, doors, ramps, elevators, lifts, ticketing/auto fare vending, platforms, mini-high platforms, public address systems, telephone, and signage. Key stations were rated in terms of their compliance for each of these 14 areas. Where a time extension (TE) or VCA was granted for compliance, it was associated with a specific element. Table 4-3 shows which elements were most often the basis of extensions or agreements. Signage, P/A system, and accessible route were the compliance elements that were most often a component of a TE or VCA. A second tier of noncompliant elements included telephones, platforms, ramps, parking, elevators, and entrances. Without more specific information about the circumstances at each transit property, it is difficult to know whether in every case the reason for a VCA for such elements as signage, telephone, P/A system, and parking was because compliance involved significant and difficult modifications. These most common elements of VCAs would seem to involve less extraordinary modification than some of the other key elements of compliance.

Table 4-3

Key Elements for Which Time Extensions Have Been Granted, February 1998

Element	**Percentage of Time Extensions**
Parking	7.56
Accessible route	10.23
Curb ramps	0.37
Entrance	6.18
Doors	3.13
Ramps	8.48
Elevators	6.36
Lifts	0.18
Ticketing/autofare vending	6.73
Platforms	7.65
P/A system	12.07
Telephones	8.85
Signage	18.53
Fare gates	1.75
Misc.	1.94

Element	**Percentage of Time Extensions**
Total extensions granted (n=1085)	100.00%

Source: Key station survey summary data, FTA, Department of Transportation, 2/98. Author calculation.

The 14 key elements used in the compliance surveys performed by the consultants are a reduced list from the instrument first developed for the assessment. The initial survey contractor reportedly developed a very thorough key station survey instrument. FTA circulated it among various transit properties, some of which balked at certain questions. FTA then pared down this survey instrument, leaving many things out.[35] It has been reported that when a contractor's surveyors came to inspect a key station, a statement was made to the effect that, "By the way, we're telling you what's on a pared-down list, but if we don't mention a particular feature, that doesn't mean it's in compliance with ADA."[36] On the condition of privacy, an FTA staff person agreed that the survey instrument being used does not cover everything needed for ADA compliance. This leaves transit properties in the position of still being legally liable for certain barriers and gives the false impression that once a transit agency fixes the problems that show up in the survey, the station is accessible. By early 1998, FTA found that 349 out of 689 key stations were out of compliance with their time extensions or VCAs, either because they did not meet their deadlines or because it was clear that work to bring them into compliance would not be done in time. In response, FTA renegotiated the VCAs and time extension agreements, extending all the deadlines. FTA sent the transit agencies letters stating that if they did not enter into a further agreement by July 1998, their cases would be sent to the Department of Justice for enforcement. As of February 1999, the agencies with the 349 noncompliant stations were either in compliance or committed in a VCA or time extension to coming into compliance by 2001. They have been told that if they do not comply by that time, their cases will be sent to DOJ.[37]

FTA admits that the VCAs and time extensions were not well enforced but insists that this has been remedied by its recent "key station initiative" in 1998-1999, during which FTA developed an elaborate tracking system and established renegotiated agreements. The FTAOCR director went on to state, "Hopefully, FTA will stick to our threats [not to extend the VCAs any longer than 2001]."[38] Given FTA's past tolerance of broken promises and its oft-stated policy of broad flexibility, it remains to be seen whether FTA will follow through in 2001.

FTA should be commended for actually conducting key station surveys, rather than just accepting the transit agency's self-description of the level of transit station accessibility. If a transit agency reported, for example, that it had 25 key stations and 20 were accessible but 5 were not, FTA might have surveyed only the 5. FTA did survey the other 20, as well. However, critics of FTA's key station program point out that the ADA deadline for key station access (July 1993) has long since passed. Those stations not in compliance and not granted a time extension for extraordinarily expensive structural accommodations have been in violation of the law since that time. Many transit agencies with no or few accessible stations took no action whatsoever toward providing access. Some of these transit agencies have been granted a VCA or time extension more than once, in effect rewarding their noncompliance with further and further extensions of their compliance deadlines. FTA's activity in developing VCAs and time extensions should also be viewed in the larger context of keeping transit dollars flowing. The last two omnibus congressional statutes providing funds for transit agencies—the Intermodal Surface Transportation Equity Act (ISTEA) and the Transportation Equity Act for the 21st Century (TEA 21)—required that, to receive funds, transit agencies must be in compliance with an extensive list of laws and regulations, including ADA.[39] The many transit agencies with noncomplying key stations could not have been considered in compliance with ADA without some resolution of the noncompliance problem and thus were in the dangerous position of being ineligible for funding. However, once a transit agency executed a VCA with FTA, the agency could be considered "in compliance" and thus still eligible for federal funding. From this perspective (one that is hotly denied by FTA), FTA had a strong incentive to develop some instrument such as VCAs to satisfy the terms of compliance with congressional funding mandates—at least compliance on paper. Of course, again on paper, the idea was that the transit agency had to stick to the terms of the VCA. In reality, many VCAs that expired with little or no activity toward improving access have been renegotiated or extended.

There are important distinctions between TEs and VCAs. Time extensions are described in the ADA regulation: they require a public input process with extensive involvement by the disability community and are to be used only in situations where a key station requires extraordinarily expensive structural modifications, such as the installation of elevators, the raising of an entire train platform, or alterations of similar magnitude and cost within a station. Only 19 key stations (out of a total of 689 key stations in the country) have received time extensions. VCAs have no public input requirements; they are not mentioned in the ADA regulation. They have been used by FTA for any access barriers at a key station, even those that are inexpensive to remove or sufficiently minor that a process of public scrutiny would not have justified an extension (for example, a major Florida transit property was given two years to fix gate pressure).[40] VCAs, created by FTA to extend congressionally mandated statutory deadlines without public scrutiny, have been issued to cover approximately half of the key stations in the country.

In defending its actions, FTA has argued that it is better to grant VCAs until 2001 than to grant time extensions, which, by statute, are allowed to extend through 2010 or even 2020. However, FTA's authority to grant long time extensions would have been limited to barriers requiring extraordinarily expensive structural modifications to remove, and those barriers would have to be documented. FTA's defense does not address the use of VCAs where access barriers do not involve extraordinary modifications and where transit agencies have engaged in few efforts to meet ADA accessibility requirements.

VCAs have been signed with 26 rail transit agencies that carry the overwhelming majority of the non-Amtrak rail passengers in the United States (including large cities such as New York City, Chicago, and Philadelphia). Disability advocates report that some transit agencies have done nothing to implement their key station plans. Many of them apparently did not apply for time extensions because they did not take the requirements seriously; FTA's actions have reassured them they did not have to.

In official comments on a review draft of this report, FTA underscored that key station assessments are a vital part of FTA's ADA oversight efforts. The assessments are conducted by highly skilled engineers who measure and record data and provide technical assistance on-site at each of the designated key stations. All assessments are conducted using the same specific categories of accessibility elements. Each assessment concludes with a comprehensive report addressing where deficiencies have been found.

The comments further noted that FTA, in accordance with DOT/ADA regulations, seeks the cooperation of the transit operators in securing key station compliance to the fullest extent practicable and works to resolve matters through informal means whenever possible. The first 80 station assessments were completed in November 1998. The final report of the first 80 stations found that various deficiencies existed at all assessed stations. The results varied by property, depending on which accessibility element was in question. Transit operators have been cooperative during the assessments and willing to work with FTA toward achieving compliance. The second round of 102 assessments was completed in April 1999, with the final draft report submitted to FTA for review in May 1999. Assessments will continue in 1999, as another 160+ key stations at the 33 transit properties will be visited. FTA anticipates that these additional assessments will be completed in the spring of 2001 and that all key stations will be in compliance by the end of 2001. The question remains how FTA will respond to transit properties still out of compliance at that time.

4.2.12 Detectible Warnings on Key Station Transit Platforms

One compliance area in which most transit systems have met their responsibilities is with regard to detectable warnings on station platforms to alert passenger with visual impairments that they are approaching the edge of the platform. Although the absence of such warning edge surfaces was a problem through the early 1990s, about 30 of the 33 transit systems nationwide were either fully in compliance or in the process of completing construction on detectable warning edges of platforms at all their key stations by 1997. Particularly slow in coming into compliance were the Long Island, Chicago, and Washington, D.C., systems. Members of the disability community indicate that only the Chicago system is still out of compliance.

The Washington Metropolitan Area Transit Agency (WMATA) has completed construction of detectable warning strips at all key stations in the system. In the eyes of some disability advocates, however, WMATA only came into compliance as a result of a lawsuit filed against it and DOT over the issue. In that action—*American Council of the Blind, et al. v. Washington Metropolitan Area Transit Authority, et al., Case No. 96-2058 (D.D.C., pending)*—the plaintiffs challenged the failure of the transit authority to install detectable warning surfaces and DOT's failure to enforce ADA with regard to detectable warnings, and claimed that DOT and FTA had arbitrarily and capriciously granted a series of extensions and equivalent facilitation determinations permitting WMATA to delay compliance. Subsequent to the filing of the suit, DOT denied WMATA's request for additional delay, and WMATA finally came into compliance. The lawsuit is still pending in U.S. District Court; the court has made no rulings in the case. Reportedly, the defendants have not been agreeable to entering into settlement negotiations.

Some disability community members believe that the DOT and FTA actions with respect to WMATA and detectable warnings over the years were unconscionable and consider it outrageous that consumers have to spend their limited resources to trigger proper enforcement by the very agency charged with enforcing the ADA transportation provisions.

4.2.13 Findings and Recommendations

Finding 46: FTA has established voluntary compliance agreements (VCAs) for key rail stations in rapid rail, light rail, and commuter rail systems that failed to meet the accessibility requirements by July 1993 and were not eligible for or did not receive time extensions for extraordinarily expensive structural modifications.

FTA has extended the earlier deadlines of the VCAs for 26 rail transit agencies that carry the majority of rail passengers in the United States despite a statutory deadline of 1993 for most of them, because so many were still out of compliance in 1998. Some transit agencies with no or few accessible stations took no action toward providing access and have been rewarded more than once with a VCA or additional time extension, further extending their compliance deadlines.

Recommendation 57: FTA should undertake more rigorous enforcement measures against several transit properties whose VCAs or time extensions have expired.

FTA should refer the cases to the Department of Justice for litigation or should hold up funding (or a portion of funding) until full compliance is achieved.

Recommendation 58: The survey instrument used in key station inspections should be comprehensive and should reflect all characteristics necessary for ADA compliance.

4.2.14 Triennial Reviews

FTA conducts what is called a triennial review process to look at the use of grant monies by each transit agency in urbanized areas. This review process is mandated by Congress. FTA must monitor the 500 transit agencies and 50 state programs that receive federal grants every three years. About 150 agencies and about 17 states are monitored per year. Triennial reviews are conducted by contractors who are inspecting 25 compliance areas at each transit agency. The area field offices coordinate these reviews, report on the findings, conduct follow-up, and forward information to headquarters on each of the reviews.

Some people have mentioned the triennial review process as a possible tool for enhanced ADA compliance monitoring. This is not possible if FTA's triennial review program continues in its current form. Each transit agency is evaluated for a period of a couple of days on every type of compliance measure FTA is required to monitor (project management, procurement, etc.). Because of its breadth, the triennial review is not detailed in any area. Sometimes significant problems with a transit agency do not even register in the triennial review. Therefore, the triennial review process appears not to be an appropriate vehicle for enhanced ADA compliance monitoring.

4.2.15 Technical Assistance

FTA can boast of the considerable amount technical assistance activity it funds. FTA funds some research projects and publications directly. It also provides funds to the following entities:

- The National Transportation Institute at Rutgers University conducts training on a broad set of areas in transportation, some of which are related to ADA.
- The Transportation Research Board (TRB) of the National Academy of Sciences conducts research and conferences and has publications, a portion of which are related to ADA. The Transit Cooperative Research Program, which is part of TRB, also conducts research, some of which is related to ADA.
- The Volpe Center conducts research and publishing.
- Project ACTION (Accessible Community Transportation in Our Nation) is focused entirely on access to public transit for people with disabilities. Project ACTION conducts research, demonstration, and technical assistance projects as well as conferences, trainings, and publications.

Virtually all the publications and the extensive training and research funded by FTA are aimed at transit agencies. Very little is available for the consumers of FTA's programs—the riders. FTA's Web site does include a link allowing one to download a copy of DOT's ADA regulation. Also posted are a complaint form a rider can send in if he or she feels an ADA regulation has been violated, as well as a form for transit agencies to use to apply for exemptions from compliance with the regulation.

In one interview, an FTA staff person mentioned that the Office of Program Management had developed the ADA Paratransit Handbook for local transit agencies. When asked about guidance for ADA complementary paratransit users, he said FTA did not develop that, since each transit agency is unique.[41] However, all transit agencies required to provide complementary paratransit are required to meet the same minimum standards. It appears that FTA has not recognized that there is a second audience for technical assistance.

One kind of technical assistance that FTA has made available to individual transit agencies is a written response to questions that transit agencies raise. However, these letters are not distributed beyond the transit agency that asked the question. Several persons in the transit industry expressed the view that it would be helpful if the industry at large had access to these letters.

Another potential aspect of technical assistance involves assistance with access to advanced technology that can improve program efficiencies. This technology includes computer systems with data analysis capabilities to generate more reliable data about service performance and to improve systems' schedule adherence abilities by automatic scheduling, automatic vehicle location systems (AVLSs), and mobile data terminal systems (MDTSs). When asked whether this type of assistance would be appropriate, FTA staff persons discounted the idea, replying that transit agencies cannot afford these systems.[42] However, these systems may increase management efficiency and thus save money. Furthermore, FTA staff persons acknowledged that there is a certain amount of fraud in carrying out ADA complementary paratransit contracts.[43] More highly developed management information systems could help transit agencies alleviate this fraud. FTA has been assiduous in developing assistance for transit agencies in other areas, but this area has been ignored.

Finally, the FTAOCR director initiated the distribution of over 15,000 brochures to the public about ADA. While these brochures announce FTA's ADA information line, they provide no other substantive information about the law or the rights it guarantees people with disabilities. The lack of substantive information seems to be related to a larger FTA policy concern about what types of interface and exchange with the disability community are appropriate. Project ACTION has some publications for people with disabilities about their rights and has conducted training, but information about these are not available on FTA's Web site, and the relevant FTA staff persons are not familiar with them.[44] The ADA regulation is available but is certainly not user-friendly. Consequently, a rider interested in learning about his or her rights has access to only a paltry amount of information resources from FTA.

4.2.16 Findings and Recommendations

Finding 47: FTA has engaged in a considerable amount of technical assistance activity, but little of it is for riders or for people with disabilities.

Virtually all the publications and the extensive training and research that FTA has funded are aimed at transit agencies. Very little of an informative nature is available for the consumers of FTA's programs, including people with disabilities.

Recommendation 59: FTA should make publications available for people with disabilities about their rights to transportation services at varying levels of complexity (brief summaries; longer, more technical documents; etc.), FTA should also provide clear notice to transit agencies that they are required to provide and post information for transit users about procedures for filing complaints regarding alleged ADA violations with the transit agencies themselves and with FTA and that such information shall be provided in culturally competent formats appropriate to their riderships.

In addition to funding the development of appropriate additional publications, FTA should have Project ACTION's consumer resources listed on its own Web site, not just a link to Project ACTION.

Recommendation 60: FTA should conduct extensive public education activities in culturally competent formats about accessible transportation for the disability community and other rider constituencies.

Recommendation 61: FTA should index on its Web site the technical assistance letters written in response to transit agency questions and make them readily available.

Recommendation 62: FTA should offer technical assistance to transit agencies in the area of advanced technologies to improve program efficiencies.

The assistance should support the procurement and development of computer systems with data analysis capabilities to generate more reliable data about service performance and systems' schedule adherence and for automatic scheduling, AVLSs, and MDTSs.

4.2.17 Overarching Themes Regarding FTA

The FTA workforce has many staff members who have held their positions for a long time. The civil rights regulatory role was imposed on an agency whose primary role was not civil rights enforcement and whose staff had not been trained in regulation and enforcement in this area on behalf of riders.[45] Despite on-paper goals to the contrary, FTA's view of itself is summed up in statements made by staff persons that "FTA is a bank"[46] and "FTA's mission is making grants."[47] FTA staff members, generally speaking, identify their constituency as transit agencies, not transit riders. One staff person described transit agencies as "basically small businesses which are losing money each year."[48] The sympathies of FTA's staff members unquestionably lie with the transit agencies, in civil rights matters as in all matters. They want to be helpful to and close with transit agencies. They communicate frequently with transit agencies and not with rider constituencies, including people with disabilities. Staff members spoke of "the inherent inequity in the [ADA] which makes the public transit system the provider of last resort."[49] There are staff members who feel differently, but they are in the minority.

This dynamic has led to a number of overall enforcement problems across the agency. A key issue is a general tendency to fail to look for systemic problems or to investigate patterns of discrimination. The result is that no matter how significant the noncompliance, there is no evidence that FTA has ever taken rigorous enforcement measures that could correct the problem by imposing meaningful sanctions on noncomplying transit agencies. FTA engages in considerable activity to ensure transit agencies' compliance with mandates, including ADA. However, whether the focus is ADA complementary paratransit plans, key stations, or triennial reviews, the activities appear to serve the primary goal of ensuring only on-paper compliance.

In ways both explicit and implicit, these attitudes are communicated to transit agencies and to people with disabilities who have dealings with FTA. Transit agencies take liberties with the legal requirements, because at times they are virtually invited to do so. Spokespersons and decision makers at FTA have not hesitated to reflect these attitudes and tendencies, both in interviews for this research and in general, in private and in public. Examples of statements that indicate these attitudes appear throughout this report, and some additional examples are described below.

In May 1998, the civil rights liaison in FTA's Office of the Chief Counsel gave a presentation on a panel at a major disability conference that created a furor. When asked about the well-known ADA complementary paratransit difficulties in New York (see section on Compliance Reviews) and the transit agency's explicit goal of allowing a 6 percent rate of trip denials (illegal, according to FTA), he said, "94 percent is still an A!" He reiterated his long-standing defense of rail systems that refuse to modify "no eating" policies for individuals with diabetes who need to eat at a specific time. He reluctantly backed down from this position when another panelist, the director of DOJ's Disability Rights Section, explained that the Department of Justice ADA regulation, which also covers transit agencies, according to DOT's regulation, would require this and similar modifications.[50]

In another example that contradicts the same DOJ regulation, FTA ruled in 1992 that a bus driver is not required to help a rider with a disability get out his or her fare card.[51] The DOT regulation does spell out some situations where assistance is required, such as securing a wheelchair. In this particular instance, the driver was asked to reach into the rider's clothing to remove the fare card. FTA's analysis of why the driver was not required to help with a fare card was that since the DOT regulation does not specifically direct drivers to assist with fares, it must not be required. However, the DOJ regulation requires a covered entity to make reasonable modifications to any policy, practice, or procedure that is necessary to avoid discrimination on the basis of disability.[52] Although DOT's ADA regulation explicitly states that public and private covered entities receiving or benefitting from federal financial assistance may also be covered by DOJ's and EEOC's ADA regulations, these entities are often unaware of these other requirements.[53] However, FTA should understand the DOT, DOJ, and EEOC regulations that may apply, as compliance is required in order to receive federal financial assistance from DOJ and avoid enforcement action.[54]

The same attitudes are evident in policy decisions. After enactment of the Transportation Equity Act for the 21st Century in June 1998, FTA staff members worked to develop a new program under that legislation that provides funds for private transit companies that use over-the-road buses (high-floor buses with baggage compartments underneath) to procure accessibility equipment such as lifts for their vehicles.[55] The legislation included a component for ADA-related training for these companies. There was preliminary discussion about how to structure training that included all affected parties. In an effort to include them in the process, FTA met with the disability community. Some helpful and creative ideas were generated, such as involving disability organizations in the training and requiring companies to attend a training program in order to receive funding. In the end, however, FTA did not adopt any of these approaches. Following this meeting, and without notifying any of its participants, FTA's Chief Counsel's Office issued a legal opinion interpreting the statutory language to require disbursement of training funds only through the bus industry and not directly to the disability community. As a result, private transit companies that already had been awarded funds could be awarded additional amounts to procure training for themselves.

4.2.18 Findings and Recommendations

Finding 48: FTA personnel, generally speaking, identify the agency's constituency as transit agencies.

FTA expends considerable energy to ensure transit agencies' compliance with mandates, including ADA, but it appears to serve the primary goal of ensuring on-paper compliance.

Recommendation 63: DOT should reassign its ADA monitoring and enforcement responsibilities to an administrative unit whose mission and other responsibilities are consistent with vigorous fulfillment of ADA monitoring and enforcement duties and which is as independent as possible from FTA offices that carry out its programmatic transportation responsibilities. Ideally, ADA monitoring and enforcement responsibilities should be assigned to a DOT entity other than FTA.

Preferably, ADA monitoring and enforcement should be relocated outside FTA in the Office of the General Counsel of DOT. If the ADA functions must remain within FTA, they should be in FTAOCR, FTA's Office of Chief Counsel, or in a new office dedicated to monitoring and enforcing ADA, rather than in FTATPM or any other office that primarily carries out FTA's programmatic transportation responsibilities.

Recommendation 64: All FTA staff members involved with any aspect of ADA monitoring, implementation, enforcement, or technical assistance (including staff from the Office of Civil Rights, the Office of the Chief Counsel, the Office of Program Management, and any other relevant offices) should receive extensive training regarding the Department of Justice ADA regulation that covers public transit agencies funded by FTA.

Recommendation 65: FTA should use the authority it has to monitor and enforce ADA rigorously, including the following tools that are already available to FTA: stronger interpretation of ADA regulations, compliance reviews, working with DOT to require transit agencies to submit complete ADA plans annually, conducting spot-check investigations of ADA compliance, and consulting more closely with the disability community. In cases of significant noncompliance, FTA should impose meaningful sanctions, including referrals to DOJ for litigation and holding up federal funds or a portion of federal funds.

4.3 United States Coast Guard

The U.S. Coast Guard Office of Civil Rights (USCGOCR) investigates complaints of discrimination under the Americans with Disabilities Act having to do with a variety of vessel-related matters, including pricing and boarding of ferries; access to ferry buildings, ship docks, and terminals; and access to cruise ships. Only a very small number of ADA complaints have been received (a total of five). They are investigated by one staff person, who also handles non-ADA civil rights matters. This staff person is able to make site visits for each complaint. His investigations appear to be thorough and comprehensive and can be seen as an overall ADA compliance review of the respondent.

One interesting and commendable feature of the Coast Guard's remedial action plans is that, when appropriate, the Coast Guard will place the complainant on the respondent's ADA Advisory Committee. This is a creative approach that finds a way to involve the complainant in resolving a discriminatory situation without compromising the U.S. government's role as the party obtaining compliance. The Coast Guard's recommendations also make frequent use of training to accompany structural and other changes, again showing a comprehensive approach to implementing the rights guaranteed by ADA. Two complaints USCGOCR is working on involve the U.S. Port of Puerto Rico. After one complaint that involved an injury suffered while the complainant was disembarking from a ship and another involving lack of access to ferry docks, the Coast Guard investigated access to docks and terminals as well as other issues. Had the Coast Guard limited its investigation to the narrowest possible issues in the complaint, modest change at best may have resulted. But the Coast Guard has chosen to look more broadly, which could mean comprehensive improvements. However, the port was apparently moving very slowly to comply, and the Coast Guard was giving the port every opportunity to comply before referring the complaint to the Department of Justice.

It may be too early to tell if the Coast Guard will have strong success in obtaining remedial action. The few complaints that may require remedial action have just come in during the past year and were in the late stages of investigation at the time this research was conducted. In the earlier ADA years, there were few to no complaints. This is probably due in part to the fact that, while the ADA covers boats and ships, there are still no specific structural access requirements for these vessels under ADA; these are currently being developed by the Access Board's Passenger Vessel Advisory Committee. The Coast Guard is involved with this advisory committee. Once these standards are developed and finalized, there will probably be more ADA activity by the Coast Guard. A USCGOCR staff member commented that complaints are small in number, but he is sure there are more problems out there than he hears about. He acknowledged that it would be a good idea for him to communicate more broadly about ADA, such as speaking at conferences for states' departments of natural resources. In its official comments on the courtesy draft of this report, USCG disavowed this view and characterized it as wholly inaccurate. The USCG External Civil Rights program director indicated that ADA enforcement presentations have been and continue to be made at such conferences and that civil rights personnel raise ADA issues for discussion.[56] A program manager from the External Civil Rights program office also attends Access Board meetings in order to be closely involved in the evolving information and issues on structural accessibility and passenger vessels.

4.3.1 Findings and Recommendations

Recommendation 66: The Coast Guard should continue firm, active enforcement to achieve remedial action.

Recommendation 67: Staff members of the Coast Guard's Office of Civil Rights should continue its proactive stance in educating the states about ADA compliance issues.

4.4 Federal Aviation Administration

The Federal Aviation Administration (FAA) investigates complaints of discrimination under the Americans with Disabilities Act having to do with accessibility of airports. While the FAA had not finalized a formal set of written investigation procedures for ADA complaints at the time research for this report was conducted, the procedures followed by staff members in dealing with complaints seemed to work fairly well. A strong, serious expectation that civil rights compliance can and will be achieved was observed; this positive attitude comes from the management of this unit and undoubtedly enhanced the whole process. In November 1999, the FAA Office of Civil Rights (FAAOCR) issued a directive containing comprehensive agency procedures for investigating complaints and conducting compliance reviews under Title II of ADA and Section 504 of the Rehabilitation Act of 1973.[57] The order addresses the FAA's delegated responsibility to ensure that airport grant recipients and airports owned by public entities avoid discrimination against persons with disabilities. In addition, the FAA's Office of Airport Safety and Standards issued an advisory on June 30, 1999, designed to assist airports in complying with the full panoply of statutory and regulatory laws.[58] In developing the document, the FAA coordinated and obtained input from the EEOC and the ACCESS Board. The result was a comprehensive technical assistance guide on accessibility in airports for which the FAA has been widely praised.

When a complaint is received, it is sent to the FAA's area field offices for investigation, along with citations to the sections of the regulation that appear to apply.

Sending the regulatory citations, a recent innovation, is no doubt helpful, particularly since the civil rights staff members in the Washington office have identified their main need as training on ADA for the staff of the area field offices.

The area field offices conduct investigations, sometimes requesting guidance from the FAA headquarters office in Washington. They do not always conduct on-site evaluations but sometimes must verify something via photograph or by contacting an FAA employee in the appropriate city to check whether work has been done. Again, there is an expectation that verification will take place, even if the resources are not available for site visits; the strong sense of expectation is one that other civil rights offices might emulate. If there is a weak link in the system, it is the varying level of substantive knowledge and investigative rigor in the area field offices, which the new guidance documents should help to address. Headquarters staff are often on the telephone, conducting informal training. At times there are some real difficulties in some areas. FAAOCR in Washington, however, appears to be coping admirably with the difficult situation of coordinating investigations by area field offices it does not control by direct line authority. Sometimes it must engage in repeated communications to get action. Some field offices respond well, others not so well.

A promising development is that in the past 18 months, the FAA has made a special effort to get transition plans from airports. Transition plans are documents required by ADA and Section 504 of the Rehabilitation Act documenting a covered entity's plan for making structural changes to comply with accessibility requirements. The FAA required all 600+ commercial airports to submit them to area field offices during 1997. When a complaint was being investigated on a particular airport, the transition plan would be added to the corrective action plan. While the FAA had not evaluated these plans at the time research was conducted, just requiring their submission was a helpful and proactive step. The FAA now requires such review as set forth in Order 1400.9, which specifies that

> a. Regional offices must ensure that general aviation airports (as well as commercial service airports) comply with the requirement for a transition plan.

b. Regional offices provide written notice to the airport operator following review of a plan. The notice includes a determination whether the plan addresses the items referenced in 28 C.F.R. Section 35.150(d), Department of Justice (DOJ) Regulations implementing Title II of the ADA. It is FAA's policy to not provide written approval of a transition plan since changes to it may need to be requested at a future date based on information obtained through a complaint or other source. Without conducting an on-site review of the facility, FAA has no way of knowing whether the plan identifies all physical obstacles that limit accessibility.

c. The airport operator must submit documents, such as bid specifications, drawings, plans, or blueprints, verifying that the steps outlined in the plan to make facilities accessible are implemented.[59]

While, in general, the substantive knowledge of ADA by the FAAOCR staff in the Washington headquarters office was very good, there were two issues upon which there appeared to be some confusion. In situations where a publicly funded airport leases space to a private entity such as a newsstand, it appears that the FAA may have been interpreting ADA as saying that the language of the lease could release the airport from the obligation to ensure that the private entity complies with Title II of ADA. Similarly, it appeared that the FAA believed that if an air carrier (that is, an airline) is renting a portion of an airport terminal, an access violation in that portion is subject only to the Air Carriers Access Act (ACAA), not ADA. Both of these were incorrect interpretations. Under ADA, if a private entity leases space from a governmental entity (such as a publicly funded airport) to carry out a specific service the airport wishes to occur in that space (e.g., selling newspapers or food), the government entity must ensure that the service by the private entity is conducted in compliance with Title II of ADA. (In addition, of course, the private entity presumably has its own responsibilities under Title III of ADA.) Furthermore, even if an air carrier rents part of an airport terminal, therefore triggering coverage of that carrier under the ACAA, that does not remove the airport's obligation under ADA to ensure nondiscrimination in that terminal. Both the airport and the air carrier would have liability, the air carrier under the ACAA and the airport under ADA.

In official comments on the review draft of this report, the FAA noted that Order 1400.9, issued in November 1999, clarifies the obligations of privately owned airports and airport facilities operated by concessionaires under Title III and the corresponding obligations under Title II of airports to ensure that its lessees operate their businesses in a manner that allows the airports to meet thei0r Title II obligations. The order also addresses the Title III obligations that apply to taxi service providers and private shuttle services between the airport and the surrounding area.[60] Finally, the order states unequivocally that "services programs and activities provided or made available by a private firm under contract with a public entity are subject to Title II of the ADA and 28 C.F.R. 35.130(b)(3).[61] The comments also clarified that in order to facilitate enforcement of the non-Title II provisions, the FAA's policy is to refer complaints covered by the ACAA to the Office of Aviation Enforcement and Proceedings, in the Department of Transportation, which is responsible for ACAA enforcement.

4.4.1 Findings and Recommendations

Recommendation 68: The FAA should take whatever steps are necessary to ensure ADA compliance by airports and private concessionaires with regard to the applicability of ADA to private landlord-tenant leases; these steps should include prompt and vigorous enforcement of FAA Order 1400.9.

To the extent that any determinations of nondiscrimination have been based on previous misinterpretations, complaints should be reopened.

Recommendation 69: The FAA should conduct training on ADA and investigative procedures for FAAOCR staff members in area field offices.

Recommendation 70: Rather than conducting complaint investigations exclusively in the area field offices, the FAA headquarters office should take a more proactive role as partner and guide to area field offices in their complaint investigation activities by providing specific support on particular investigations.

The FAA should allocate adequate resources to implement a headquarters/field partnership approach to complaint investigation and resolution.

Recommendation 71: The FAA should work with the Office of the General Counsel at DOT to convene a summit on improving air travel for passengers with disabilities.

Key topics to be addressed at the summit include ADA enforcement in airports and Air Carrier Access Act enforcement for airlines.

4.5 Federal Highway Administration

The Federal Highway Administration (FHWA) investigates complaints of discrimination under the Americans with Disabilities Act having to do with curb ramps, accessible parking and enforcement thereof, sidewalks, and commercial driver's licenses. Effective January 2000, Congress split Motor Carrier Safety off from FHWA as a separate administration. A new waiver process providing individual consideration for people with disabilities also was established by the Transportation Equity Act for the 21st Century (TEA-21).

FHWA has carried out two initiatives in the area of ADA accessibility since the research for this report was completed. The Bicycle/Pedestrian group funded a study and recently issued Part I of a two-part publication entitled "Designing Sidewalks and Trails for Access." Part II, which will be a "best practices" guide, is expected to be published in the spring of 2000. Members of the Bicycle/Pedestrian team also contributed to the development of the Access Board's newly proposed guidelines for outdoor developed areas and will represent DOT as part of the Access Board's new advisory group addressing guidelines for the public right-of-way. A multidisciplinary FHWA team has also worked with the Access Board for some time, developing a technical assistance manual for accessible public rights-of-way. The technical assistance manual, anticipated to be published soon by the Access Board, will give guidance to assist public entities in providing accessible curb ramps in the public right-of-way environment.

During the spring of 1999, the former deputy FHWA administrator charged a work group with developing an action plan to improve transportation accessibility for persons with disabilities. The resulting recommendations were Department-wide in scope, and have been strongly supported by disability groups and individuals interested in accessibility initiatives.

When the interviews for this report were conducted, FHWA had a field structure consisting of nine regional offices, with division offices in each state and some territories reporting to those regional offices. At that time, FHWA was studying various options for restructuring field and headquarters offices and their functions. Complaints were received in FHWA's Civil Rights (FHWAOCR) headquarters office in Washington, D.C., and sent to (then) regional (now field) offices for investigation.

Field restructuring became effective on October 1, 1998. All nine regional offices were eliminated, and line authority and accountability for most program areas, including civil rights, were granted directly to the division offices. Additional personnel resources were granted to the divisions, including 22 full-time civil rights specialists located in 20 divisions. Texas and California each have two specialists; other divisions each have one civil rights specialist whose civil rights responsibilities make up the major part of his or her duties. Since regional offices no longer exist, ADA complaints are sent directly to the division offices by FHWA headquarters in Washington, D.C.

Four field resource centers were also created during the restructuring. These centers—in Baltimore, Atlanta, Chicago, and San Francisco—have no line authority but are composed of highly skilled specialists in various fields, including civil rights. Their primary functions are to provide necessary training and technical assistance to divisions and to serve as troubleshooters, assisting divisions with particularly difficult problems.

FHWA headquarters restructuring became effective in January 1999. FHWA headquarters is currently divided into Core Business Units (CBUs) and Service Business Units (SBUs), such as Civil Rights. These units have cross-cutting policy and coordination responsibilities affecting all core programs. The Civil Rights SBU currently has responsibility for final agency decisions addressing external complaints, including external ADA complaints. FWHA developed a new set of guidelines for processing external discrimination complaints after the research for this report was completed. The guidelines provide that the Civil Rights SBU will make all determinations regarding acceptance or rejection of complaints based on specific criteria. Division authority and accountability for following up on complaint resolution also are addressed in the guidelines.

Interviews with a number of parties during early 1998, both within FHWA and outside FHWA but close to its operations, revealed many different perspectives and opinions on a number of interacting problems that impaired the quality of ADA enforcement by FHWA.

- *Poor investigation by field offices*

When members of the headquarters staff were asked the results they received from the field offices' investigations, they noted that many times they saw complaints dismissed for insubstantial reasons; resubmission to the field for reinvestigation did not result in further action. Interviewees also said that sometimes the complainant was not even contacted in the course of the investigation. Headquarters staff appeared very well-intentioned toward rigorous enforcement and frustrated about how to make it happen. Since the field reorganization, the division offices in each state now have civil rights specialists, many full-time, who can investigate complaints, do training, and work with engineering staff to ensure that both engineering and civil rights concerns are appropriately addressed in ADA investigations.

- *General atmosphere of FHWA*

Several interviewees observed that a weakness in all civil rights enforcement at FHWA (not just ADA) is that FHWA is an engineering organization. They perceived an attitude endemic to the agency that "We're engineers; we're just here to build roads and highways," while other issues are side issues not deemed to have priority. While DOT Secretary Rodney Slater has consistently put forward a more people-oriented approach, this attitude has certainly not been pervasive in the past, and it is taking time to filter down through the bureaucracy. This problem was reported to be particularly strong at the level of the field administrators, whom interviewees viewed as the weakest links. According to this view, field administrators were not strong advocates of civil rights issues, and field civil rights directors (who are subordinate to the field administrators) were directly affected by that attitude. The perceived result was that field civil rights directors would rather "work things out" with states and other covered entities than make findings of noncompliance; staff members sometimes felt they were supposed to "back off" rather than pursue rigorous enforcement.

In its official comments on a review draft of this report, FHWA reported that the field and headquarters restructuring have resulted in some significant attitudinal and operational changes. FHWA noted that throughout the restructuring period, its management stressed the importance of civil rights responsibilities and accountability within the divisions at briefings and meetings.

Also noted in FHWA comments was the fact that training has assumed a much higher priority at FHWA. At the direction of the FHWA administrator, the headquarters Civil Rights SBU developed and presented a week-long basic civil rights training, including ADA components, for division civil rights specialists, administrators, assistant administrators, and others. The director of professional development in the headquarters Civil Rights SBU has a strong civil rights background and interest in skills training. FHWA now also has a Professional Development SBU to make appropriate training available to all headquarters and field personnel. These initiatives appear to be significant steps toward addressing some of the weaknesses in civil rights enforcement identified by the interviewees.

- *Lack of established investigation procedures*

The lack of established and documented procedures was mentioned by some interviewees as a cause of minor and sometimes substantial problems. One interviewee felt the lack of guidance for the field offices on how to conduct ADA investigations was a minor problem. Another interviewee also identified the lack of finalized investigation procedures as a problem and expressed frustration at the difficulty in getting the procedures finalized by FHWAOCR. FHWA's recently published procedures should have a positive impact on alleviating errors and impasses resulting from a lack of guidelines.

- *Lack of direction*

Another interviewee offered the opinion that staff working in the field do not have much direction from headquarters.

- *Inadequate legal analysis early in the process*

Another perspective regarding the quality of FHWA's ADA enforcement program is that despite efforts made, the lack of legal research conducted early in the process sometimes produces inadequate results. (See problems cited under "*Poor investigation by field offices*" above.)

- *ADA not seen by some as an important civil rights issue*

Another problem cited is that field staff have traditionally viewed civil rights as limited to Title VI (Civil Rights Act of 1964) compliance issues, and they are less familiar with the newer laws, which are viewed as somewhat ancillary.

- *Disagreement about who can require remedial action*

In the past, there was some disagreement within FHWA as to which part of the agency can require remedial action to resolve a complaint of discrimination. One field staff person said that in his opinion, the field may not require remedial action; only headquarters can. He viewed the field's authority as limited to conducting investigations. The headquarters staff countered that the field does have authority to require remedial action. In fact, headquarters staff contended that monitoring remedial action is part of the field's enforcement responsibilities. The recently published guideline on processing external complaints should address this issue to clarify where the authority to require remedial action lies.

In summary, there appear to be several interacting problems that are roadblocks to rigorous enforcement. In the midst of it are a number of FHWAOCR staff members who wish to enforce firmly and proactively but feel prevented from doing so by various seemingly intractable problems.

4.5.1 Particular Substantive Issues

- *Curb ramps*

One of the most important areas of ADA enforcement by FHWA concerns allegations of cities' failure to construct and maintain curb ramps adequately. When asked about this issue, FHWA staff members noted that the ADA Accessibility Guidelines (ADAAG) did not yet include standards for public rights-of-way (streets and sidewalks), so adequate legal tools to enforce the curb ramp issue did not yet exist. Staff persons further stated that when they have informed covered entities of the curb ramp priorities, the attitude of some has been, "So, sue me!" This raises the question of what action FHWA should initiate beyond the public rights-of-way technical assistance manual undertaken with ADAAG. It is true that the ADAAG's guidance on streets and sidewalks has not yet been formally adopted by the Department of Justice, but there is adequate guidance in current ADA documents for municipalities to implement ADA's curb ramp requirements. The DOJ Title II regulation clearly requires curb ramps to be constructed, and DOJ has issued a letter interpreting what Title II's program access standard means in the curb ramp context. The current ADAAG has some curb ramp specifications, and further guidance is available in the Access Board's Interim Final Rule in the ADAAG section on Public Rights of Way (Section 14). Adequate legal tools exist for FHWA to conduct rigorous enforcement on this extremely important issue that is central to the daily lives of people with disabilities.

- *Accessible parking*

Another important ADA issue within FHWA's enforcement responsibility is accessible parking. A review of FHWA's performance with regard to this issue revealed several problems:

1. FHWA finds violations to be very difficult to prove.

2. Police departments report that they cannot use their resources to do as much as should be done to enforce accessible parking.
3. Headquarters staff members stated they have not been firm about this issue with staff in field offices. While DOJ clearly views accessible parking to be enforceable by FHWA and sends accessible parking complaints to DOT for forwarding to FHWA some FHWA field staff members seem to believe it is not their responsibility to investigate these complaints because it is a "law enforcement issue." They advise complainants to go back to DOJ.

This loop gives complainants nowhere to turn. However, one successful strategy by the headquarters office has been to provide covered entities with various ways to approach the problem. Some jurisdictions are using citizen volunteers to enforce accessible parking requirements and are finding this to be a successful strategy.

It is important for FHWA to convey clearly and uncategorically to the field offices that it is FHWA's responsibility to investigate these complaints.

4.5.2 Analysis of Individual Complaint Files

Researchers reviewed 19 individual complaint files. One or two showed that effective action had been taken. For example, in one, a sidewalk was inaccessible and in need of repair. FHWA told the city to fix it, and the city did so. FHWA also required the city to develop an ADA grievance procedure, which it did, and the city's description of the procedure is included in the complaint file. However, even in these cases, the files lacked any indication of analysis under ADA. Most files contained only correspondence; no documents were in evidence, such as reports listing applicable sections of law, issues, or legal analysis. Many included no notes or other documentation from the investigation. Another problem is that in almost all cases, even when FHWA letters state that corrective action is needed, there is no further correspondence or other evidence of FHWA monitoring that the remedial action actually occurred. Complaints were often closed with just the pledge by the covered entity to provide a remedy. For example, one complaint cited the need for a curb ramp. FHWA agreed the current condition did not comply with ADA but closed the complaint, stating that the city had agreed to construct the ramp by a certain date in the future. There was no verification that the ramp was ever built, even though correspondence shows the state department of transportation volunteered to verify that the construction was accomplished if FHWA wished.

Another complaint, filed by an organization, was based on the charge that a lack of lighting of highway signs rendered them inaccessible to drivers with some vision limitations. FHWA stated that there was no complainant with a disability. But under Title II of ADA, anyone can file a complaint on behalf of people with disabilities who may experience discrimination because of a barrier or policy. FHWA further stated that it could not find evidence that the lighting in question was a problem. However, the file does not show that any inquiry was made to groups representing people with visual impairments, nor was there evidence of any other kind of research by FHWA to determine that the situation was not problematic. There is no discussion of what standard the signs would have to meet in order for the state's highway program to be found as nondiscriminatory.

Another complaint concerned an employee's need for parking on a particular side of the employer's building, a private hospital. The employer proposed an accommodation with which the complainant was not satisfied. FHWA cites the employer's effort as meeting its obligation under ADA. There was no analysis of whether the requested accommodation was an undue hardship or whether the employer's proposal provided meaningful equal employment opportunity (the two relevant legal standards in ADA). To make these judgments, an investigator would need to undertake a factual investigation, which does not appear to have occurred. Further, it is not clear why FHWA was investigating an employment complaint at a private hospital. It appeared to researchers that this complaint would normally be under DOJ's jurisdiction. The complaint was originally sent to FHWA, but federal agencies are required to refer complaints to the correct agency if they are sent to the wrong agency. FHWA's final letter to the complainant does mention the EEOC (with no phone number or address offered) but still assumes that FHWA has jurisdiction over the parking issue.

Still another example involved a complaint of barriers in a new sidewalk construction project. FHWA's request for information from the complainant and its closing letter went unanswered, so the complaint was closed. However, FHWA's two letters may have been unanswered because they went to the wrong address. (The complainant's address on his correspondence was 900 [followed by the street name], and FHWA's letters were addressed to 9000.) Another complaint file also shows a misaddressed closure letter.

4.5.3 Findings and Recommendations

Recommendation 72: FHWA should shift most of its complaint-investigation activity to the headquarters offices.

FHWA should use its field offices for specific support on particular investigations but should not locate the entire investigation in the field office. FHWA should allocate sufficient resources to accomplish this reassignment of responsibilities.

Recommendation 73: DOT should provide education and training for the field offices to clarify that civil rights enforcement is a primary component of FHWA's overall mandate.

DOT should use parties both within and outside FHWA as appropriate. Thorough training should be conducted and should include a focus on ADA's substantive requirements in the areas enforced by FHWA, including curb ramps and accessible parking, and on investigative procedures. While there has apparently been some training in the past, more is greatly needed. Headquarters staff should be involved in this training.

Recommendation 74: The Office of the Secretary of DOT, DOT's Office of the General Counsel, the FHWA administrator, FHWA's Office of Chief Counsel, and the field office administrators should take whatever actions are necessary to ensure that ADA and other civil rights issues are taken more seriously by the field offices.

Recommendation 75: FHWA should require that each complaint file include a Report of Investigation with findings of fact, applicable sections of law, issues, and legal analysis.

No complaint requiring corrective action should be closed without verification that the corrective action is taken, and this verification should be included in the complaint file. These steps should be taken immediately; it is not necessary to wait until formal investigation procedures are finalized. Past complaints that were closed without monitoring of corrective action should be reopened for documented verification of whether the remedial steps were taken.

Recommendation 76: FHWA should engage in rigorous enforcement with respect to curb ramp complaints, an extremely important issue that is central to the daily lives of many people with disabilities.

FHWA should use the adequate legal tools currently available under ADA. FHWA must convey clearly and uncategorically to the field offices that it is FHWA's responsibility to investigate complaints regarding enforcement of accessible parking.

4.6 Federal Railroad Administration

The Federal Railroad Administration (FRA) investigates Amtrak-related complaints of discrimination under the Americans with Disabilities Act. FRA's files include about 15 complaints under ADA. At the time research for this report was conducted, from early to mid-1998, the process for dealing with complaints in FRA was unusual and problematic. The acting director of civil rights, who had no staff, logged all complaints and then sent them to Amtrak for investigation and resolution, despite the fact that Amtrak is the covered entity against which the complaints are filed. The acting director felt this was warranted, since Amtrak had more information about its own cars, stations, and policies than did FRA. Amtrak responded to the complainant, as did FRA when it received Amtrak's answer.

The acting director of civil rights stated that FRA can always disagree with Amtrak's resolution of any particular complaint, and Amtrak must reinvestigate. She stated that this had occurred and that Amtrak had then modified the resolution of the complaint. However, she was unable to provide such documentation from any complaint file. Complainants were generally reimbursed the cost of the ticket by Amtrak. There appeared to be no concern for or knowledge about whether or not this was the appropriate remedy under ADA. Staff members could not recall any systemic changes that have been made as a result of an ADA complaint. Amtrak has been making a number of changes in the accessibility area, but these appear to be in response to new staffing at Amtrak (more on this below) and to a private lawsuit against Amtrak settled in May 1998.

One obvious problem with the complaint investigation and resolution process was the extraordinary understaffing (a single employee) of the FRA Office of Civil Rights (OCR) until early 1999, when a permanent director of civil rights replaced the acting director and hired two additional employees. FRA's method of handling complaints differed markedly from procedures laid out in Title II of ADA, which states that the federal agency itself will investigate the complaint, attempt voluntary conciliation, and refer any findings of discrimination to the Department of Justice.

It is noteworthy that FRA's Chief Counsel's Office agreed that FRA should have been conducting the investigations and stated that the acting director of civil rights was wrong in her description of what she did. The Chief Counsel's Office contended that the acting director of civil rights did not send complaints to Amtrak for investigation. He contended that Amtrak was merely consulted in the course of the investigation. However, personnel at Amtrak and an examination of complaint files corroborated the acting director of civil rights' description of how her office operated.

The Chief Counsel's Office further averred that it could not become involved in FRAOCR procedures, like them or not. The chief counsel's representative stated that the Office of the Secretary of DOT delegated civil rights functions to FRAOCR. Therefore, if FRAOCR took what Amtrak said as authoritative without verification or investigation, that was its decision, and, in order to ensure the independence of FRAOCR, the Chief Counsel's Office could not become involved. This was not the interpretation of other DOT operating administrations, such as NHTSA and FTA, where the chief counsel's offices are very involved in their respective OCR enforcement programs. DOT's general counsel also disagreed with the contention by the FRA Chief Counsel's Office that a DOT operating administration's chief counsel's office may not become involved in the work of its OCR..

Interviews with personnel at Amtrak confirmed that Amtrak was conducting investigations, communicating with complainants, and carrying out very modest remedies, almost always in the form of reimbursement of the ticket cost. Amtrak was in an unusual situation. Approximately two years before this research was conducted, Amtrak hired as its

ADA coordinator an individual experienced in ADA transportation compliance, Rosalyn Simon. There is no doubt that her work at Amtrak has resulted in significant improvements. Even so, the Amtrak situation bore out the adage about the outcome when the fox guards the henhouse. Virtually no ADA complainants received the remedies available under ADA, which included systemic changes toward ADA compliance (such as removal of a barrier or a policy change) as well as compensatory damages. Instead, complainants received an apology letter and reimbursement of the cost of their ticket.

Amtrak is itself responsible under Title II of ADA to establish and conduct an internal grievance procedure. Amtrak's own investigation of complaints (those that come from FRA as well as many others that come directly to Amtrak) may well be in conformance with that requirement, which is not the subject of this research. In any case, Amtrak was not responsible for the lapses in enforcement by FRA.

There is evidence that Amtrak has improved its internal grievance procedure. For example, instead of complaints going to various Amtrak offices in different areas of the country, they are being centralized into Rosalyn Simon's Washington, D.C., ADA unit, facilitated by a nationwide 800 number and an e-mail address. Amtrak states that it averages a 10-day turnaround time on complaints and has sent an investigator as far as Florida. Occasionally, in addition to an apology letter and reimbursement for tickets, there are further consequences: researchers were told of one complaint that resulted in more accessible parking being provided at an Amtrak station and others that involved Amtrak supervisors reprimanding staff for failing to provide ADA accommodations. In its official comments on a review draft of this report, FRA informed NCD that FRAOCR, in addition to a threefold increase in staff, has changed to reflect new attitudes and methodologies as well as increased emphasis on ADA enforcement. The official comments specifically noted the relationship between the FRA chief counsel and the OCR, which it contends is now "a good one," with "appropriate interaction between the two offices." Despite having more than three months to respond to the review draft, FTA's official comments provided no factual data to support these assertions.

4.6.1 Analysis of Individual Complaint Files

Issues in two FRA complaint files illustrate some general problems. One involved a complaint that an individual could not board the train on two occasions, one time because of tight turning space at the entrance of the car and the other time because there was not adequate clear space for her to sit on the train without extending her leg into the aisle, creating a tripping hazard. The file includes a detailed letter from Amtrak with an offer of reimbursement and a brief closure note from FRA. But neither letter nor any other document in the file states whether the trains were out of compliance with ADA, analyzes how and why, or mentions any corrective action.

Another complaint concerned Amtrak's telling the complainant and other residents with disabilities of the same city that people who need boarding assistance (including anyone using a wheelchair) cannot take trains that leave before 11 a.m. because no staff are available to provide assistance. FRA's letter to the complainant, like Amtrak's, provided names and phone numbers of two individuals who could be called at any time with a request to provide staffing at off-hours. One of the individuals was the same person the complainant stated she already called, and who was not able to help. These letters stated nothing about whether this practice is discriminatory under ADA (it clearly is) and offered no monitoring to ensure that the policy would change in the future.

4.6.2 Findings and Recommendations

Recommendation 77: FRA should conduct its own investigations rather than relying on Amtrak.

Each complaint file should include a Report of Investigation with findings of fact, applicable sections of law, issues, and legal analysis. No complaint that requires corrective action should be closed without verification that the corrective action is taken, and this verification should be included in the complaint file.

Recommendation 78: FRA should closely monitor the staffing needs for the ADA complaint investigation and enforcement function.

Until recently, the FRAOCR staffing level was clearly and egregiously inadequate to handle this important work. FRAOCR should prepare an evaluation report to the FRA administrator in the summer of 2000 assessing the adequacy of staffing and other resources presently available for conducting an effective enforcement program.

Recommendation 79: FRA should provide appropriate staff training to personnel involved in the ADA investigative and enforcement functions.

4.7 National Highway Traffic Safety Administration

The National Highway Traffic Safety Administration (NHTSA) investigates complaints of discrimination under the Americans with Disabilities Act having to do with driver's licenses and disabled persons' license plates and parking placards. Approximately 102 ADA complaints have been received since enforcement began.

All complaints investigated by NHTSA are handled in their entirety by the headquarters office in Washington, D.C. Area field offices are not involved. The NHTSA Office of Civil Rights (OCR) does a considerable amount of the work; it also works closely with NHTSA's Chief Counsel's Office on these matters.

The processing of ADA complaints by NHTSA was clearly the most careful, thorough, and rigorous of all the operating administrations of DOT. Many aspects of NHTSA's standard investigations stand out as unique and commendable:

- The investigations are carried out in accordance with NHTSA's manual on investigation procedures for ADA complaints, which describes what letters are necessary, how to prepare a legislative report, how to conduct an outside investigation, how to analyze data, how to prepare a Report of Investigation, and how to prepare an agency decision.
- Each investigation begins with
  - An extensive interrogatory sent to the covered entity, requesting all documents related to the complaint (documents of a general nature as well as documents relating to what happened in the alleged incident of discrimination) and asking extensive questions of the covered entity about the incident.

- A form to be signed by the complainant, giving permission for release of confidential materials pertaining to him or her.

Both of these documents are sent by certified mail, and a copy of the return receipt is kept in the complaint file.

- The NHTSAOCR staff members, in general, appear to be well trained.

- Each complaint file includes a lengthy Report of Investigation (ROI), which contains an extensive discussion of various parts of ADA and the regulations that pertain to the alleged incident of discrimination and a thorough analysis of the relevant legal issues. At the end of the investigation, the complainant and respondent each receive copies of this ROI, as well as NHTSA's shorter letter stating its final conclusion.

- Before each ROI is finalized, a draft is circulated through NHTSA's Chief Counsel's Office, and all the attorneys in the office read and discuss the report, particularly in cases that raise complex legal issues.

- NHTSA appears to do a good job in analyzing ADA legal issues. NHTSA takes an expansive view of ADA and in many cases appropriately requires corrective action of states that are engaging in discriminatory practices or that could, with minimal effort, accommodate individuals whose disabilities require it. When NHTSA makes a finding of nondiscrimination, the Report of Investigation reflects a careful legal analysis adequately justifying that conclusion. A number of complaint files show that NHTSA considers legal issues that are related to the alleged discriminatory incident but that go beyond the strict, narrow issue raised by the complaint.

- In complaint investigations where corrective action is required, the complaint files include verification that the corrective action was taken.

- Some complaint files contain NHTSA's request for a covered entity's ADA self-evaluation and transition plan, even when the alleged discriminatory incident does not relate directly to issues in these documents. Staff members reported that they learn a great deal about a covered entity's approach to and understanding of ADA from these documents.

- Some of NHTSA's recommendations to covered entities show its recognition of the importance of the participation of people with disabilities and organizations representing people with disabilities in developing disability-related policy. For example, in one case when NHTSA found discrimination and recommended a change in state policy, NHTSA not only recommended that the state convene a panel of medical and legal experts, it also encouraged that the panel include disabled individuals or organizations representing their interests.

NHTSA has a relatively high success rate for obtaining systemic change through voluntary compliance. For example, three states have changed statewide policies as a result of NHTSA investigations. A typical example was one state that had a blanket policy of denying a driver's license to individuals who have a vision impairment that requires them to use bioptic lenses. The file evidenced NHTSA's considerable research of scientific evidence that shows that, while many individuals who use bioptic lenses can not safely drive, authorities in the field recommend that bioptic lens users be individually tested, as some can safely drive. The state in question changed its policy to conform to state-of-the-art scientific opinion of individual testing. Interviewees inside and outside NHTSA expressed a variety of opinions about why NHTSA's ADA complaint investigation program is effective, including the following:

- Covered entities, which are usually state motor vehicle bureaus, comply because they fear the authority of the Federal Government intervening to enforce federal law. NHTSA is funding these state agencies, and that fact is used by NHTSA to compel action toward compliance.

  This perception is noteworthy, because in most of DOT's operating administrations, the fact that DOT funds the states (or other covered entities) has the opposite effect: it creates a closeness between DOT and the covered entity that makes DOT reluctant to take the covered entity to task. Yet, for NHTSA, its clout as a funder is cited by NHTSAOCR as a helpful factor in obtaining compliance.

- NHTSAOCR has a strong civil rights ethic. For example, its director stated that, though some have disagreed with him throughout his career, "I made it clear I won't tolerate injustice. I have to let people know that. I do it respectfully, but I do it. Some people say you're not a team player. But this isn't a team sport!"[62]

- The close involvement of NHTSA's Chief Counsel's Office, without question, plays a very helpful role. The Chief Counsel's Office is to be commended for its commitment of time and attention to ensuring the quality of NHTSA's civil rights enforcement program. There appears to be a great deal of cooperation and informal training in this relationship.[63]

- An interviewee outside NHTSA credited its ADA success, in part, to NHTSA as an overall agency and its tolerance of NHTSAOCR's rigorous attitude.
- Another interviewee outside NHTSA credited its ADA success to the fact that NHTSA's headquarters office conducts the entire investigation: NHTSA does not have to send complaints to area field offices for investigation (see discussion of the pros and cons of investigations being conducted by area field offices).

4.8 Privately Funded Transit

Privately funded transit compliance is enforced by the Department of Justice (DOJ). DOJ's enforcement efforts consist of investigation of complaints.

4.8.1 Description of Complaint Investigation Activities

Members of DOJ staff report that, while they do not keep track of how many private transportation complaints have been received, DOJ has investigated a high percentage because of its general interest in enforcement of ADA transportation issues. DOJ has investigated a total of 16 cases involving airport shuttle services or rental car shuttle services. Almost all these complaints involve the failure of the shuttles to have lifts. For example, a company in Arizona is being required to provide a lift-equipped shuttle and to pay damages. A few complaints are about discrimination related to service animals. The remedies provided include requiring the policy modification needed to carry the service animals, purchase of accessible vehicles, and agreement to maintain maintenance records on the accessible van so that DOJ can monitor whether, if the vans are not in service, they have been properly maintained. Some damages are also included (amounts vary between $2,500 and $10,000). Four of these cases are closed; two found no discrimination; and two are closed and have been satisfactorily resolved. Two are going to mediation, and the rest are still under investigation.[64]

DOJ is currently investigating three cases involving discrimination in taxi service. They involve taxis passing by people with disabilities and not picking them up.

DOJ has opened 27 investigations involving privately funded buses, with the overwhelming majority against Greyhound Lines, Inc. The content of the cases include failure to provide boarding and other assistance, refusal to transport service animals, rude drivers, and inaccessible buses or terminals. Several cases have been closed (one with a satisfactory resolution) and the rest are open and under investigation. DOJ reports that Greyhound will be asked to provide compensatory damages to parties when someone has been egregiously harassed or insulted, or refused service.

DOJ has also opened some investigations regarding a variety of issues related to rental cars. Many are about the failure to provide hand controls.

Since these transportation complaints are handled by DOJ in the same manner in which it handles the enforcement of other complaints, further assessment of its complaint processing is found in the chapter on the Department of Justice.

4.9 Technical Assistance

DOT carries out ADA technical assistance primarily through a contract with Project ACTION (Accessible Community Transportation in Our Nation). Project ACTION is a national program funded through a cooperative agreement with DOT's Federal Transit Administration (see section 4.2.7 for additional discussion of transit technical assistance). Project ACTION works with both the disability community and the public transit industry to create cooperative solutions to transit accessibility under ADA. Project ACTION has 7 full-time staff and a budget for FY 1999 of $3 million.[65] The organization promotes accessible public and private transportation, primarily by providing information to help transportation operators understand and implement ADA. Core activities include the following:

- Community demonstration and research projects (84 projects have been funded);
- ADA technical assistance projects with transit operators (14 projects have been funded);
- Provision of training, resources, and technical assistance to disability organizations, consumers with disabilities, and local transportation operators;

- A resource center with information on transportation accessibility.

Project ACTION maintains a Web site (www.projectaction.org) that includes a publications database, information about current projects, a travelers' database on transit accessibility, an archive file, and information about upcoming conferences and events. The Web site can be viewed in a text-only format. The organization publishes a quarterly newsletter. Annual priorities are identified in a yearly work plan submitted to FTA. The plan is developed with input from the National Steering Committee and customers, and responds to perceived trends in the transit industry.

4.10 Summary of Findings: Issues for the Department of Transportation as a Whole

In the course of this research, NCD reviewed a critical report on DOT's Offices of Civil Rights. Published on February 29, 1996, the "Report on the Department of Transportation Offices of Civil Rights," prepared by the Office of the Assistant Inspector General for Inspections and Evaluations, Office of the Inspector General, Department of Transportation, included the following findings:[66]

- "A. Civil rights programs were not fully implemented....Specifically, OCR concentrated their efforts on only two major programs (Title VII and DBE), placed minimal emphasis on Title VI, and virtually ignored ADA and Section 504."
- "B. Civil rights policies, procedures, and guidance were deficient: DOT OCR's inadequate policies, procedures, and guidance were not affording program beneficiaries CR protection in accordance with the letter or spirit of the law." (In this section, lack of guidance on ADA was singled out.)
- "C. ...Reporting and tracking systems provided limited information and CR data was unavailable to adequately conduct a CR compliance program."
- "D. Information was insufficient to determine staffing needs."
- "E. Adequate training was not provided." (In this section, ADA was one of four areas singled out where formal training was nonexistent.) "Without sufficient formal training, CR employees could not adequately and accurately process

> complaints; conduct compliance reviews; or provide technical assistance, outreach, and counseling."

Since the 1996 report, some things have changed. For example, some department-wide ADA training has been provided. But many of the same issues remain. DOT should comply with the extensive recommendations in the inspector general's report. In addition, a number of issues particular to ADA arose in the course of the research. They are discussed below.

4.10.1 Reluctance to Enforce Rigorously Because of Close Relationships

It is widely acknowledged both within and outside DOT that the main issue impairing its civil rights enforcement capability is the fact that DOT's operating administrations are the main providers of funding to many of the covered entities over which they have enforcement responsibility (e.g., the Federal Transit Administration funds local public transit agencies; the Federal Highway Administration funds state highway organizations). The funding relationship and the administrative interconnectedness that comes from it create a situation of closeness, even of protectiveness; DOT's operating administrations are very reluctant to make findings of discrimination against the covered entities. As stated by one DOT official, "In an ideal world, there would be more independence between the modal administrations and the entities they fund and deal with." In some modal administrations, this problem is worse than others. It is particularly significant in the Federal Transit Administration.

A very different phenomenon appears in the National Highway Traffic Safety Administration (NHTSA), one of DOT's operating administrations, where the funding relationship does not appear to compromise enforcement (see the section on NHTSA).

4.10.2 Difference in Attitudes Between Higher and Lower Levels of DOT

In 1997, Rodney Slater became the Secretary of DOT. He has consistently enunciated and acted on a new attitude at DOT: that DOT's programs are not just about concrete and asphalt, or planes, trains, buses, and boats; they are about people. Secretary Slater and DOT General Counsel Nancy McFadden have demonstrated an outstanding commitment to civil rights, a commitment that is new at DOT. The DOT action that perhaps most exemplifies this commitment was the publication on September 28, 1998, of the long-awaited ADA regulation on over-the-road buses operated by private entities. ADA mandated publication of this regulation in 1994, but it was stalled, in large part because of controversy on the issues and the indecision of previous leadership. Not only did Secretary Slater publish the regulation, he also ensured that its contents carry out the letter and spirit of ADA.

In July 1999, Secretary Slater introduced a number of new accessibility initiatives at a DOT event celebrating the 9th anniversary of ADA:

1. A new departmental policy statement stressing access for individuals with disabilities to all modes of transportation
2. Distribution of new DOT publications outlining maximum access and guidelines for sidewalks, trails, and airports
3. Creation of a partnership with the U.S. Access Board to develop guidance on accessibility in pedestrian public rights-of-way
4. Unveiling of a DOT Web site on "Accessibility" that coordinates and integrates links to DOT, the Federal Government, and advocacy organizations (www.dot.gov/accessibility)
5. $2 million in FTA over-the-road bus grants to assist in the capital cost of making over-the-road buses accessible
6. Recognition of best practices by cities/planners across the country, including awards to San Francisco, California; Austin, Texas; Seattle, Washington; and Silver City, New Mexico.

In addition, just over a year ago, the Department issued a final rule that required, for the first time, over-the-road buses and service to be accessible. The American Bus Association challenged this rule in court. Recently, a Federal District Court in the District of Columbia upheld the DOT rule.

Despite the new commitment of the leadership of DOT, large bureaucracies change slowly, and the attitude at the top has not filtered down through all the modal administrations, either in the headquarters offices in Washington, D.C., or in the (10) former regional offices (this is discussed in more detail below).

4.10.3 Decentralization

Civil rights enforcement in DOT is very decentralized. While there is a Departmental Office of Civil Rights that retains certain overall functions, there is also an office of civil rights in each modal administration, which is in charge of the actual investigation and compliance monitoring process. Furthermore, in some of the modal administrations, enforcement is even further decentralized in that the offices of civil rights in the headquarters (Washington, D.C.) offices send complaints out to their various area field offices across the country for investigation.

Reportedly, there has been a long-running turf battle between DOT's Departmental Office of Civil Rights and the offices of civil rights in each of DOT's operating administrations. This report does not take sides in this dispute. In theory, either a centralized civil rights structure or a decentralized civil rights structure could be made to work effectively. Realistically, it is unlikely that a centralized structure will be established, because DOT as a whole is a very decentralized organization. Its operating administrations, including entities as diverse as the Federal Aviation Administration (which regulates air travel), the Federal Highway Administration (which administers the federal aid to highways program), and the Federal Railroad Administration (which regulates railroads) are very separate. Therefore, it seems probable that DOT's only practical alternative is to strengthen the current decentralized model. A further form of decentralization in some operating administrations is the sending of complaints to area field offices for investigation. This is done by the Federal Aviation Administration and the Federal Highway Administration. This practice appears to inherently weaken civil rights enforcement, because area field offices vary considerably in their knowledge level and their prioritizing of the issue of civil rights. (It appears to work somewhat better at the FAA, where there is an attitude of firm expectation from the headquarters office.) Yet, it would not be practical to recommend a complete stop to the use of field offices, since they are a geographically dispersed resource on which the headquarters offices must rely.

The model in the Federal Transit Administration of the use of regional (now field area) offices appears to work better than the FHWA or FAA models. In FTA, most of the complaint investigation process is done in the headquarters office, but the area field offices do become involved in certain significant complaint investigations and other ADA functions. FTA's method of dealing with complaints is more consistent and coordinated and, as a result, more effective. It is recommended that, like FTA, FAA and FHWA shift more of their complaint investigation activity to their headquarters offices and use the area field offices for specific support on certain investigations, rather than locating the entire investigation in the area field office. Resources should be allocated to support this shift.

FTA also differs from FAA and FHWA in that the field office civil rights staff report to the director of the headquarters Office of Civil Rights. Generally, field civil rights staff report to the field office managers, for whom civil rights may not be a high priority. Yet, merely changing "who is the boss of whom," while desirable, might be problematic for other reasons and is not a specific recommendation of this report. However, the Department is encouraged to consider this change. (See more discussion in the Federal Highway Administration section.)

This report recommends more training as well as an attempt to instill in the area field offices a higher regard for the importance of civil rights functions.

4.10.4 Departmentwide Administration of Complaints

The Departmental Office of Civil Rights (DOCR) receives complaints from DOJ and distributes them as appropriate to DOT's operating administrations. DOCR complains that it receives complaints from DOJ after a considerable lag time (up to a year between a complaint being received by DOJ and being referred to DOT).

DOCR has succeeded in greatly shortening the amount of time it takes to refer complaints to the modal administrations. During FY 1996, the average time a complaint spent in DOCR was more than 60 days; in FY 1997, it was 49 days; and in 1998, it was under 9 days. DOCR has been attempting for some time to implement a departmentwide computer database of complaints. It is a complicated and multifaceted project, and it is difficult to evaluate whether or not it could be developed any more quickly. However, the plans for the database at the time of this research did not include the tracking of several important items. In addition to tracking individual complaints and the time frames in which they are resolved, the system should also allow tracking of patterns of systemic discrimination. For example, the system should allow FTAOCR to quickly determine what ADA complaints have been filed in the past against a particular transit agency or to track a specific type of discrimination issue across the state, region, or country.

4.10.5 Findings and Recommendations

Recommendation 80: DOT should continue the trend begun by Secretary Slater in placing a higher priority on ADA and other civil rights enforcement. The modes should be proactive in allocating adequate resources, both in terms of staff and training, to their offices having civil rights enforcement responsibilities.

Civil rights offices, like many other areas of government, have been expected to do more and more with less and less. This is particularly difficult in civil rights enforcement, which is a complex legal area that is labor intensive and requires considerable knowledge.

Recommendation 81: DOT should foster a closer relationship between the Departmental Office of Civil Rights and the offices of civil rights in the operating administrations.

DOCR should attempt more formal and informal linkages with the various offices of civil rights. Creative thinking and positive intent about a new beginning will be necessary here. The training activities discussed elsewhere may be helpful toward this end. More coordination and joint meetings could also play a role in this strategy.

Recommendation 82: DOT should make civil rights a higher priority by making civil rights experience an important qualification for a promotion to an upper-level job.

If it were an important criterion for officials' career advancement, civil rights would likely get more attention and respect in the Department. Higher-level staff members with civil rights experience would provide a positive influence regarding how DOT's civil rights responsibilities are viewed throughout the organization.

Recommendation 83: The Office of the Secretary of DOT should institute and institutionalize measures to promote increased priority, understanding, and implementation of transportation rights of passengers with disabilities. Such initiatives should address the entire administrative structure of DOT, to increase the efficacy of ADA enforcement efforts in the Office of the General Counsel, the office of the administrator of each mode, the office of the chief counsel of each mode, the office of civil rights of each mode, and the field office managers, down to the front-line enforcement personnel in the field offices.

These measures should include increased monitoring of and accountability for performance of ADA enforcement responsibilities throughout the DOT chain of command. In particular, DOT should require that each of the various modes develop objective criteria defining degrees or forms of noncompliance by covered entities that will trigger specific types of sanctions among a range of such sanctions of varying degrees of severity.

Recommendation 84: DOT should inaugurate a dedicated office or other formalized program of providing technical assistance to the public about the availability of its ADA enforcement program.

DOT's Office of the General Counsel recognizes that not enough complaints are being filed to enable the civil rights structures to induce systemic change through the application of enforcement authority. The paucity of complaints is largely the result of a lack of familiarity by potential complainants of their rights and of DOT complaint mechanisms. Outreach should extend to users of all forms of public transportation, including all bus, ADA complementary paratransit, and rail users (including Amtrak); to persons seeking both regular and commercial driver's licenses; to people with disabilities using streets and sidewalks; to airport users with disabilities; and to passengers of commercial vessels and ports.

Recommendation 85: DOT should initiate agencywide training to improve investigation procedures.

Each complaint file should include a Report of Investigation with findings of fact, applicable sections of law, issues, and legal analysis. No complaint requiring corrective action should be closed without verification that the corrective action has been taken, and this verification should be included in the complaint file. These steps should be taken immediately; it is not necessary to wait until formal investigation procedures are finalized. Past complaints that were closed without monitoring of corrective action should be reopened for verification of whether appropriate remedial steps were taken.

Recommendation 86: DOT should initiate additional substantive training on ADA for its staff.

The Department has already offered ADA overview training. Additional training opportunities for persons who did not attend, and for refresher training, would be useful. Additional training is also needed for all civil rights staff in legal analysis under ADA and other civil rights laws. Relevant staff members in each modal administration (both headquarters staff and, especially, area field office staff) should receive in-depth substantive training in the particular areas of ADA that are enforced by that mode. In some of the modal administrations, the headquarters staff can be involved as trainers. One goal of the training would be to alleviate the problem that, on some complaints, extensive work is conducted before a higher-level legal analysis reveals jurisdictional problems or lack of coverage.

Recommendation 87: DOT should ensure that the planned departmentwide database of complaints will allow an operating administration to quickly determine what ADA complaints have been filed in the past against a particular covered entity or to identify the complaints involving the same type of discrimination issue in a particular state, region, or throughout the country.

Recommendation 88: DOT, under the leadership of the Office of the Secretary, should engage in strategic planning and evaluation involving regular consultation with the disability community as the basis for developing a focused strategy for improving its performance and maximizing its impact in enforcing ADA.

Such efforts should seek to ensure that the input of passengers and potential passengers with disabilities are considered in DOT's efforts to enforce ADA and to monitor the performance of DOT's modes with regard to such enforcement.

Endnotes

1. The section on the Federal Transit Administration is the most in-depth because FTA enforces ADA's extensive requirement of public bus systems, most passenger rail systems (including rapid, light, and commuter rail—everything except Amtrak), and publicly funded ADA complementary paratransit. Also, of all DOT's operating administrations, it has received the largest number of complaints of discrimination.

2. Comments provided by Federal Transit Administration Office of Civil Rights on March 23, 2000, review draft of this report, April 18, 2000, p. 2.

3. To gain a comprehensive picture of how the ADA enforcement mechanism functions at FTA, many interviews were conducted with FTA staff members during the research phase. FTA requested that, other than the FTAOCR director, staff members not be named in references to their remarks cited throughout this evaluation.

4. Department of Transportation, *Report on the Department of Transportation Offices of Civil Rights*, prepared by the Office of the Assistant Inspector General for Inspections and Evaluations, Office of the Inspector General, February 29, 1996.

5. Interview, FTAOCR staff member, March 20, 1998.

6. Interview, FTAOCR staff member, April 2, 1998.

7. Arthur Andrew Lopez, director, FTA Office of Civil Rights, July 1, 1998, describing FTA's approach to enforcement of the capacity constraints service criterion.

8. Interview with FTAOCR staff member, April 2, 1998.

9. Follow-up telephone interview with Arthur Andrew Lopez, director, FTA Office of Civil Rights, February 25, 1999. On this point, Lopez was quoting statements by an FTA Office of Program Management staff member in meetings between FTA staff and lawyers from the Department of Justice. Lopez added, "The difficulty in FTA's implementation was that the civil rights aspect of the provision of service was not emphasized and reinforced to the transit community. It was common until around 1997 for the transit community to complain about ADA being an unfunded mandate as an excuse for improper service. We believe that our efforts have had an effect in changing this attitude and tone, although we know it still exists within the transit community."

10. The ADA Paratransit Compliance Study, by the Disability Rights Education and Defense Fund and Crain & Associates, for Project ACTION, July 1996.

11. During the course of research on this report, FTA's chief counsel, Patrick W. Reilly, wrote a letter to Stephen F. Gold, Esq., of the Public Interest Law Center of Philadelphia that contradicts FTA's operational policy interpreting capacity constraints narrowly. Responding

to a letter of December 22, 1998, from Gold, Reilly wrote in his March 23, 1999, letter that "If...a transit agency denies ADA complementary paratransit service to a qualified individual with a disability because it does not have the capacity to respond to demand, the denial...is discrimination." The letter also stated, "According to the regulations, the transit agency 'shall not require an...eligible individual to schedule a trip to begin more than one hour before or after the individual's desired departure time'...An operator's inability to accommodate...eligible individuals within this two hour window amounts to a prohibited capacity constraint." This letter was a welcome sign to disability advocates, though it contradicted both stated policy by FTA's director of the Office of Civil Rights and FTA's actions on many complaints of discrimination, including one resolved during the same time period as when the correspondence took place.

12. Information about this complaint came from James Weisman, associate executive director for legal affairs, Eastern Paralyzed Veterans of America, private interview, February 1999. Weisman discussed the sheltered workshop complaint in general as well as quoting from his discussion about it with Arthur Andrew Lopez, director, FTA Office of Civil Rights. Information about all the other complaints discussed in this section came directly from FTA.

13. James Weisman, associate executive director for legal affairs, Eastern Paralyzed Veterans of America, private interview, February 1999.

14. These efforts by DOJ have been aimed at a referral by FTA/DOT stemming from a complaint of discrimination. FTA/DOT did refer a different kind of issue to DOJ once, in 1994, when San Francisco Municipal Railway would not establish a voluntary compliance agreement (VCA) with FTA to make key rail stations accessible. As soon as the referral was made, the transit agency did enter into a VCA with FTA.

15. A credible source in the transit field, interviewed in February 1999, who spoke on the condition of confidentiality, quoting an FTA Office of Program Management staff member.

16. Follow-up telephone interview with Arthur Andrew Lopez, director, FTA Office of Civil Rights, February 25, 1999.

17. Mike Bachhuber, PAIR advocacy specialist, Wisconsin Coalition for Advocacy, February 23, 1999.

18. Mike Bachhuber, PAIR advocacy specialist, Wisconsin Coalition for Advocacy, telephone interview, March 4, 1999.

19. Mike Bachhuber, PAIR advocacy specialist, Wisconsin Coalition for Advocacy, February 23, 1999.

20. James Weisman, associate executive director for legal affairs, Eastern Paralyzed Veterans of America, private interview, February 1999.

21. James Weisman, associate executive director for legal affairs, Eastern Paralyzed Veterans of America, private interview, February 1999.

22. Susan Scheer, telephone interviews, June 8 and 9, 1999. Scheer served as assistant deputy advocate for the Office of the Public Advocate, City of New York, until March 1999. Scheer then became the executive director of the Center for Independence of the Disabled of New York.

23. Telephone interview with FTATPM staff member, April 3, 1998, and face-to-face interview with FTATPM staff members, April 7, 1998.

24. This information came from a transit consultant who worked for FTA on contract in the reviewing of ADA complementary paratransit plans, who spoke on the condition of confidentiality.

25. The ADA Paratransit Compliance Study, by the Disability Rights Education and Defense Fund and Crain and Associates, for Project ACTION, July 1996

26. Telephone interview with FTATPM staff member, April 3, 1998.

27. FTATPM staff member, during a group interview, April 6, 1998, regarding statement about unfunded mandate.

28. Arthur Andrew Lopez, in an interview that also included FTA staff members from FTAOCR, FTATPM, and the Office of the Chief Counsel, April 6, 1998.

29. Interview with Arthur Andrew Lopez that also included FTA staff members from FTAOCR, FTATPM, and the Office of Chief Counsel, April 6, 1998. Also, interview with FTATPM staff members, April 7, 1998.

30. Interview with FTATPM staff members, April 7, 1998.

31. Interview with Arthur Andrew Lopez, director, FTA Office of Civil Rights, April 6, 1998.

32. ADAPT is a national grassroots disability advocacy organization.

33. FTATPM staff member, during a group interview, April 6, 1998.

34. A leading advocate in New York reports that, in cooperation with the transit agency, 46 key stations were added to their original 54 by state statute (610 A11734-A §51) in 1994, but that FTA refused for a number of years to consider the added stations as key stations for enforcement purposes. FTA staff alleged that there is no provision in the regulation to add key stations. (James Weisman, associate executive director for legal affairs, Eastern Paralyzed Veterans of America, private interview, June 7, 1999, quoting a staff member, Office of the Chief Counsel, FTA.) It is not clear whether FTA's total number of key stations

includes these additional stations.

35. This information came from a transit consultant who has worked for FTA on contract, who spoke on the condition of confidentiality.

36. This information came from a transit consultant who has worked for FTA on contract, who spoke on the condition of confidentiality.

37. Follow-up telephone interview with Arthur Andrew Lopez, director, FTA Office of Civil Rights, February 25, 1999.

38. Follow-up telephone interview with Arthur Andrew Lopez, director, FTA Office of Civil Rights, February 25, 1999.

39. The Intermodal Surface Transportation Equity Act, PL 102-240, and the Transportation Equity Act for the 21st Century, PL 105-178.

40. A Florida transportation advocate who spoke on the condition of anonymity.

41. Interview with FTATMP staff member, April 7, 1998.

42. Interview with Arthur Andrew Lopez and FTA staff members from FTAOCR, FTATPM, and the Office of the Chief Counsel, April 6, 1998.

43. Interview with FTATPM staff members, April 7, 1998. Also, one such complaint is described in the section "Investigation of Complaints of Discrimination."

44. Project ACTION also has involved people with disabilities to a significant degree in other ways. In particular, Project ACTION has involved consumers in meaningful ways in research program design and in implementation of innovative service practices in accessible transportation.

45. Interview with Arthur Andrew Lopez, director, FTA Office of Civil Rights, March 16, 1998.

46. Interview with Arthur Andrew Lopez, director, FTA Office of Civil Rights, March 16, 1998.

47. Interview with FTATPM staff members, April 7, 1998.

48. Interview with FTATPM staff members, April 6, 1998.

49. Interview with FTATPM staff members, Office of Program Management, FTA, April 7, 1998.

50. Staff member, Office of the Chief Counsel, FTA, and John Wodatch, director of the Disability Rights Section, U.S. Department of Justice, panelists at the National Conference on Independent Living, May 15, 1998.

51. Disability Law Compliance Report, December 1992, page 8.

52. 28 C.F.R. 35.130(b)(7) and 28 C.F.R. 36.302(a).

53. [49 C.F.R. 37.21(c), 49 C.F.R. 37.37(c),(d),(h).] 49 C.F.R. 27.19 (a).

54. Id.

55. See 49 U.S.C. 5310.

56. Statement of the USCG External Civil Rights program director in the Official DOT comments dated February 23, 2000, on ADA report review draft, p. 10.

57. Federal Aviation Administration, Order 1400.9, *Americans with Disabilities Act and Rehabilitation Act Operating Procedures*, November 18, 1999.

58. Federal Aviation Administration, Advisory Circular (AC) 150/5360-14, *Access to Airports by Individuals with Disabilities*, June 30, 1999.

59. Federal Aviation Administration, Order 1400.9, Chapter 7, *Review of Transition Plans*.

60. See Order 1400.9, par. 4 c (3).

61. See Order 1400.9, par. 61.

62. Telephone interview with George Quick, May 1998.

63. Heidi Coleman leads this effort.

64. Interview with Dan Searing, December 11, 1998.

65. Interview with Nancy Smith, Project ACTION executive director, February 3, 1999.

66. Department of Transportation, *Report on the Department of Transportation Offices of Civil Rights*, prepared by the Office of the Assistant Inspector General for Inspections and Evaluations, Office of the Inspector General, February 29, 1996.

5. FEDERAL COMMUNICATIONS COMMISSION

5.1 Organization and Structure of Enforcement

Effective communication may be even more crucial today than it was when ADA was passed. At the same time, making effective use of communication options has become increasingly complex and challenging, with increasing dependence on telecommunications to conduct everyday business and the rapid increase in technologies such as voicemail and audiotext-based information systems.[1] The telecommunications relay services (TRS) technology in 1990 was meant to be a starting point on an ever-changing path toward functional equivalency in telephony. Video relay is an example of innovations serving that goal.

Title IV of ADA consists of two provisions: one requires captioning of federally funded or produced public service announcements; the other, more widely known, mandates nationwide telecommunications relay services. TRS bridges the gap between users of text telephones (also called telephone typewriters or TTYs) and regular voice users by enabling persons who have TTYs (or computers performing the same function) to carry on telephone conversations with persons who do not have them, through the use of an intermediary person (called a communications assistant or CA). The CA voices the typed message of the TTY user to the hearing user and types the hearing user's message back to the TTY user. There are several variations of relay services, including hearing carry over (HCO) and voice carry over (VCO). In HCO, a person with a speech disability who is able to hear the other user types messages on a TTY; the CA voices the TTY message to the other user. VCO enables a person who can speak but has a hearing disability and uses a TTY to speak directly to the other user; the CA types the other user's responses on a TTY for the person with a hearing disability.

Title IV amended the Communications Act of 1934, which had mandated that communications services be "[made] available, so far as possible, to all the people of the United States… (Section 1). The Title IV provision added a new Section 225 to the

Communications Act, extending the coverage of universal service to those consistently excluded: people who are deaf or hard of hearing. To achieve telephone service functionally equivalent to that of the hearing public, Section 225 mandated that TRS be available in every state and that it meet certain minimum standards. The statute also recognized that technology was moving quickly and that the specific methods for achieving functional equivalency would change with the rising tide of technological improvements. Congress stated that "…the provisions of the Section do not seek to entrench current technology, but rather to allow for new, more efficient and more advanced technology."[2]

The Federal Communications Commission (FCC) shares enforcement responsibility for Title IV/Section 225 with the states. Congress attempted to balance ensuring universal, efficient, functionally equivalent TRS with preserving the historical jurisdiction of the states over intrastate telephone common carriers. Section 225 gives the FCC the authority to set minimum standards for state certification and gives states latitude in selecting providers, specifying services above the minimum, handling complaints, and funding TRS. In addition to its authority for certifying state plans, the FCC can financially penalize a carrier who is found not in compliance.

Virtually all common carriers are required to provide TRS in their service areas and can fulfill this mandate in various ways, including participation in a certified state plan (which typically vests one provider with statewide responsibility). States contract with TRS providers, which could be regional centers of national long-distance telephone companies (the predominant mode), local phone companies, or statewide nonprofits. The responsibility for contract standards, and their enforcement, lies with the states, once the FCC has approved the state plan.

5.2 Regulatory Activities and Policy Development

The FCC published regulations implementing Section 225 (Title IV) on August 1, 1991. The statute required states to devise plans to ensure that the "functional equivalency" requirements of Title IV are met. Specific standards cover issues such as hours and days of availability of TRS; speed of call answering by CAs; access to long-distance carriers; confidentiality; publicity about TRS; and competence of the CAs in typing speed, grammar, spelling, and other functions. States submitted their plans to the FCC for review and the FCC approved the state plans for TRS for the first time by the statutory deadline of July 26, 1993. Certifications last five years; the second round of certifications occurred in 1998. Some states have imposed statewide relay requirements exceeding the FCC's minimum standards. No state has been decertified.

In 1997, the FCC issued a Notice of Inquiry (NOI) seeking comment on ways to improve TRS.[3] Following extensive response (49 comments and 34 reply comments) from the deaf community, advocates, the telecommunications industry, and other interested parties, the FCC issued a Notice of Proposed Rulemaking (NPRM) on May, 20, 1998.[4] Comments were due on July 20, 1998, and reply comments on September 14, 1998. There were five categories of issues in the NPRM:

A. Coverage of Improved TRS Under Title IV of ADA
   1. Scope of TRS generally
   2. Speech-to-speech (STS) relay service
   3. Video relay interpreting (VRI) services[5]
   4. Multilingual relay services (MRS) and translation services
   5. Access to emergency services
   6. Access to enhanced services

B. Mandatory Minimum Standards
   1. Speed of answer requirements
   2. CA quality and training
   3. In-call replacement of CAs

C. Competition Issues

1. Multivendoring

2. Treatment of TRS customer information

D. Enforcement and Certification Issues

E. Other Issues

Again, dozens of replies came from consumers, advocates, the industry, and others. The 60 comments and 51 reply comments available on the FCC's Disability Issues Task Force Web site[6] reveal passionate concern about the proposed rules, the current state of TRS, and its future. While supportive of certain FCC proposals to improve TRS (such as a universal requirement for STS relay, which is currently mandated by some but not all states), consumers expressed many concerns about current TRS standards, which they felt were inadequately addressed in the NPRM.

The National Association of the Deaf (NAD) compiled a concise summary of the comments. In it, NAD noted that consumers commenting on the FCC's NPRM took the following positions:[7]

- support for expansion of the definition of TRS (beyond traditional TTY/voice relay)
- support for a mandate for STS relay services
- request for a phase-in of VRI services[8]
- support for reimbursement of foreign language relay interpreting (so that hearing non-English-speaking parents of deaf children may communicate with their children)
- support for provision of ANI (automatic number identification) to 9-1-1 centers for emergency calls
- support for access to automated voice response systems

- support for the FCC's proposed revision on the calculation of the speed of answer
- request for additional CA qualifications, including minimum typing speeds, spelling/grammar correction software, assessments of CA proficiency in the English language, CA training on new technologies and equipment (including conference calling and two-line VCO)
- support for limiting the in-call replacement of CAs to no fewer than 10 minutes
- support for a rule requiring the phase-in of multivendoring
- support for the transfer of TRS caller profiles to new state providers
- support for new enforcement procedures, including the provision of additional information on local complaint procedures
- request for a national advisory committee to monitor relay service quality
- request for new technologies, including call release features, two-line VCO, and caller-ID relay identification.

Some telecommunications carriers, TRS providers, and state relay administrators raised issues about topics in the NOI, including the following:

- The statutory definition of TRS—some providers stated that the inclusion of improved services under Title IV should be made case-by-case; one argued that only TTY-based service qualifies.[9]
- New and improved forms of TRS—whether they should be subject to FCC standards and whether costs for improved TRS should be recoverable, including when such services are provided voluntarily.[10]
- Speech-to-speech service—some providers objected to its being required, especially before state level development had been monitored by the FCC.[11]
- Implementing VRI nationally—some commenters termed the cost prohibitive and suggested that the supply of sign language interpreters is inadequate to staff it; industry and state administrators opposed mandating VRI at this time.[12]
- Responsibility for providing access to services such as pay-per-call and voice-menu systems—some commented that the entities offering those services, not the TRS providers, are responsible under Titles II and III of ADA.[13]

- Quantitative typing speed requirements for CAs—some commenters said adopting such standards would make it harder for providers to hire.[14]
- In-call CA transfers—some providers offered justifications such as injury avoidance and collective bargaining agreements.[15]

5.2.1 Findings and Recommendations

Recommendation 89: The FCC should adopt all the policy and practice suggestions of NAD, the Consumer Action Network (CAN), and the Council of Organizational Representatives on National Issues Concerning People Who Are Deaf or Hard of Hearing (COR), grounded as they are in years of information-gathering about and analysis of consumer needs and technological possibilities.

These suggestions are contained in the comments and reply comments to the NPRM, and range from technical operational issues such as coin-sent paid calls; to a recommendation that VRI be required in all states and its costs be recoverable; to a recommendation that states be required to collect, track, and forward to the FCC a record of all complaints and their dispositions.

5.3 Complaint Processing

Consumers are required to take TRS complaints first to their states. Complaints about intrastate TRS can be sent to the FCC, but the FCC will refer those complaints to the appropriate state agency (although no figures are publicly available, sources estimate that 85% – 90% of TRS calls are intrastate, similar to the percentage of non-TRS calls[16]). The statute gives the FCC jurisdiction over complaints referred to state agencies if final action has not been taken within 180 days of the complaints being filed with the state. However, according to FCC staff and consumer advocates, fewer than a half-dozen complaints have been filed directly with the FCC. They speculate that (1) consumers are more likely to know how to complain to their state agency, if they know where to complain at all; and (2) telephone service is a new product for deaf people, so their expectations for quality may not yet be as high as those of hearing people, who have been using telephones all their lives. It is certain that states receive complaints (state-level litigation is one proof), but there is no central source of information about them, and the states are not required to report the complaints and their disposition to the FCC except in summary form as part of the certification process every five years.

5.3.1 Findings and Recommendations

Finding 49: States include information about complaints in conjunction with their state plans, which are submitted to the FCC every five years. There is no central source of information about the effectiveness of the complaint process in the states.

The comments and reply comments on the FCC's Notice of Proposed Rulemaking demonstrate that while there has been progress in the variety of services offered, much work needs to be done to bring TRS to a level of quality that would constitute "functional equivalency."

Recommendation 90: Congress should fund a nationwide study of the way the various states are handling the statutory requirement of "functional equivalency."

Recommendation 91: The FCC should establish an advisory committee on disability issues, including TRS issues, to coordinate with consumers, industry and providers on state policy and practice issues, as well as new technologies.

5.4 Compliance Monitoring

The FCC is responsible for the certification process for state TRS plans, but it does not initiate any compliance reviews, and it has no jurisdiction over the actual operation of intrastate TRS unless there is a violation of the FCC's minimum standards and the FCC ultimately gets the complaint. Otherwise, compliance monitoring is reserved by the states.

5.5 Litigation

The FCC has not had to resolve any cases concerning TRS; all the litigation has been on the state level.[17] One notable example, in 1996, rose from consumer complaints in Massachusetts against MCI, the TRS provider. Among the consumer complaints were lack of accuracy and speed of the CAs; breaches of confidentiality; hang-ups; and CAs interpreting rather than relaying messages. The Cape Organization for Rights of the Disabled (CORD) represented a statewide consumer coalition that, in 1998, with the assistance of the attorney general of Massachusetts, settled with MCI on an improved set of standards and on penalties for violations of the standards. Bill Henning of CORD reports that MCI paid around $6,000 a month in fines for the duration of the contract, which went toward funding equipment for deaf and disabled customers.[18]

There is no central source of information concerning TRS-related litigation.

5.6 Public Information and Technical Assistance

The FCC offers technical assistance primarily through the departmentwide toll-free telephone and TTY numbers. All calls to the FCC's help lines go to the Gettysburg call center, where information specialists respond. There is no system for routing TRS-related calls to particular specialists. Some interviewees reported hearing complaints from TTY users that their calls were not always picked up. FCC staff members report receiving a small number of e-mails and calls from consumers with concerns about TRS; calls to the staff are not toll-free. FCC staff members use a fact sheet about TRS created by the Department of Justice; their only other printed public information material was a now-outdated brochure listing state TRS numbers. The Disabilities Issues Task Force maintains a Web page offering information such as last year's Notice of Proposed Rulemaking, the comments and reply comments received, information about Commission actions related to TRS, and links to some state TRS agencies. Outreach about TRS occurs at the state level, with no national coordination.

While the compliance with Title IV of ADA has been required for only five-and-a-half years, TRS has been around for twice as long.[19] No one knows for sure, but sources estimate that no more than 5 percent of the overall population is familiar with TRS. The promise of functional equivalency must be still unfulfilled if only a small minority—perhaps even a small minority of the estimated 28 million people who are deaf or hard of hearing—know TRS exists.[20]

Success stories about increasing awareness and use of TRS do exist. In its Request for Proposals for TRS in Maryland, the state agency included a requirement that the chosen vendor spend $250,000 a year for outreach and public information on TRS, subcontracted to a public relations firm and recoverable in its rate payments. Coordinated with the state's own efforts, this campaign includes direct targeted mail, bill inserts, and television ads. This year's effort centers on the introduction of three-digit TRS access; in Maryland, dialing 711 now connects a caller to TRS. Next year's campaign will focus on informing seniors, many of whom become hard of hearing later in life, about the existence, use, and benefits of TRS.

TRS call volume in Maryland increased after the first major outreach efforts, and monthly inquiries about TRS went from less than 200 to as many as 1,700. With a large, politically active deaf community, Maryland reports it has by far the highest per capita use of TRS in the United States, twice that of most other states, and receives only 20 complaints a month about TRS service.[21]

There is still great potential for inclusion of deaf and hard-of-hearing people into the commercial, social, and educational mainstream of American life. TRS, one tool to achieve that inclusion, is a product with a waiting market—a market waiting to learn that the product exists.

5.6.1 Findings and Recommendations

Finding 50: A minority of the estimated 28 million people who are deaf or hard of hearing know about TRS. Outreach is done at the state level, with no federal coordination. Models do exist for increasing awareness and use of TRS.

Finding 51: The National Association of State Relay Administrators provides states with an opportunity to share information. There is no official forum including consumers, advocates, state relay staff, and providers to serve as a forum for discussion of such issues as best practices, state-level consumer involvement, public outreach, new technologies, or regional cooperation.

Recommendation 92: Congress should fund a TRS technical assistance clearinghouse to provide information to consumers and relay providers.

Consumers could use information on questions such as What goes into a consumer TRS profile? How can a VCO call be made? How do I choose a long-distance carrier? Relay providers could learn about new technologies and TRS advancements. The FCC could use the information to update its TRS standards.

Recommendation 93: The FCC should amend the minimum standards to significantly increase the public information and outreach efforts required.

The purpose of the outreach should be to increase general public and specific population awareness of TRS (not to promote the products of the TRS provider, as has been reported by advocates about earlier efforts). Costs should be recoverable through the same funding mechanisms as exist for TRS itself. The standards should reflect successful state-level efforts.

Endnotes

1. An audiotext-based information system refers to computerized voice-driven information systems frequently used by businesses, which require users to press a button or give an oral response (e.g., "enter your account number and press the pound sign").

2. See 47 U.S.C. § 225(d)(2); H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 130 (1990) (House Report II).

3. Telecommunications Relay Services, the Americans with Disabilities Act of 1990, and the Telecommunications Act of 1996, *Notice of Inquiry*, CC Docket No. 90-571, 12 FCC Rcd 1152 (1997).

4. In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CC Docket No. 98-67, FCC 98-90 (May 14, 1998).

5. VRI is a form of TRS enabling people who use American Sign Language (ASL) or another form of visual communication as their primary mode of communication to use videoconferencing (including a personal computer at home) and high-speed transmission service, with sign language interpreting as an intermediary (either at the same or another location).

6. http://www.fcc.gov/dtf/

7. Communication from Karen Peltz Strauss, legal counsel to Consumer Action Network and the National Association of the Deaf, January 12, 1999.

8. See note 5 above.

9. NPRM, CC Docket No. 98-67, FCC 98-90, at 6.

10. NPRM, CC Docket No. 98-67, FCC 98-90, at 7.

11. NPRM, CC Docket No. 98-67, FCC 98-90, at 10.

12. NPRM, CC Docket No. 98-67, FCC 98-90, at 14-15.

13. NPRM, CC Docket No. 98-67, FCC 98-90, at 20.

14. NPRM, CC Docket No. 98-67, FCC 98-90, at 25.

15. NPRM, CC Docket No. 98-67, FCC 98-90, at 27.

16. Current actual percentages of inter- and intra-state calls are not publicly available. However, TRS provider estimates are publicly available as part of the rate-setting filing with the FCC. In the Matter of Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act, CC Docket 90-571 (October 1, 1997).

17. However, there has been at least one request for state decertification brought to the FCC. In 1994, the FCC required Arkansas to revise some of its policies to avoid decertification. Personal communication from Karen Peltz Strauss, February 3, 1999.

18. Conversation with Bill Henning, January 12, 1999.

19. California mandated the country's first 24 hour/7 day relay system in 1987. Sixteen states were operating relay systems by the time ADA was introduced. National Center for Law and the Deaf, *Summary of State Dual Party Relay Services* (July 1989).

20. This estimate comes from the National Association of the Deaf, which also cites the following: (1) National Health Interview Survey, Centers for Disease Control, 1994, 22.4 million people; (2) CDC Health Statistics, 1991, 24 million people with hearing loss and 2 million deaf. It is possible that "hard of hearing" or hearing loss may include persons whose impairment does not rise to the level of disability.

21. Personal conversation with Gil Becker, director, Communications Access of Maryland Program, Maryland Department of Budget and Management, February 2, 1999. Becker reported that Maryland TRS use is 4.12 calls per 100 people and that other states' ratios include .08 calls per hundred in Arkansas, 1.88 in California, 2.7 in Oregon, 2.4 in Minnesota, 2.2 in Arizona. According to the National Exchange Carrier Association, Inc. (NECA), California has the highest total volume of TRS use.

6. ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

6.1 Introduction

The Architectural and Transportation Barriers Compliance Board (Access Board) is the federal agency that develops minimum guidelines and requirements for standards issued under the Americans with Disabilities Act (ADA) and the Architectural Barriers Act (ABA).[1] The Access Board also develops accessibility guidelines for telecommunications equipment and customer premises equipment under the Telecommunications Act, develops accessibility standards for electronic and information technology under Section 508 of the Rehabilitation Act, provides technical assistance on those guidelines and standards, and enforces the ABA. The Access Board does not enforce ADA.

The Board was created under Section 502 of Title V of the Rehabilitation Act of 1973 to enforce the Architectural Barriers Act. The agency derives its authority to issue ADA architectural and transportation guidelines from Section 504 of Title V of ADA, which states that "Not later than 9 months after the date of enactment …The Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of Title II and III of this Act."[2]

6.2 Organization

A 23-member board serves as the governing body. Eleven members are the heads of federal agencies, such as the attorney general and the secretary of transportation or their representatives, and 12 members are appointed by the President from the public. At least six of the public members are people with disabilities. The federal members are permitted to delegate their seats to other agency officials, who are usually at the assistant secretary level. For example, the Department of Justice's seat has been delegated to the assistant attorney general for civil rights. In turn, these federal members assign liaison officers, staff persons who perform day-to-day tasks relating to the board.

An executive director heads the Access Board and its staff of approximately 30 full-time-equivalent persons in carrying out board policies, developing standards, providing technical assistance, and investigating complaints under the ABA.

The Access Board has three principal operational units: the Office of Technical and Information Services, the Office of Compliance and Enforcement, and the General Counsel's Office.

The Office of Technical and Information Services (OTIS) develops standards and works with advisory committees that are developing standards. It also writes research grants and conducts research, and reviews proposals for guidelines and standards from other federal agencies. Currently under review is the National Highway and Transportation Safety Administration's Notice of Proposed Rulemaking on guidelines and standards for testing requirements for lifts. One objective of the Access Board in reviewing such guidelines is to make sure they are consistent with and do not undercut ADA standards. OTIS staff members come from backgrounds such as architecture, transportation engineering, and electronic technology, but much of their training is on the job.

The Office of Compliance and Enforcement is composed of compliance specialists who investigate complaints and provide technical assistance under the ABA.

6.3 Role in Developing and Revising ADA Guidelines

With the help of an advisory committee, the board has been working during the past five years on revisions of the Americans with Disabilities Act Accessibility Guidelines (ADAAG), spurred by the need to address concerns of architects and others in the building industry that the ADAAG is difficult to interpret and apply consistently because of the difference between the ADAAG and building codes. The advisory committee has recommended an array of changes that range from improved organization and clarification of the language to improved "scoping" and technical provisions. Many of the proposed changes reflect a better understanding of what does and does not work in the old guidelines, and a recognization of new technological developments. The recommended changes also include combining the guidelines for entities covered by the ABA and ADA into one document, with "scoping" sections applicable to entities covered by each of the two laws and a common technical section. The aim of this is to eliminate confusion about which guidelines are applicable. The recommendations also include guidelines applicable to certain state and local government facilities (courthouses, detention facilities, and public housing) and a significantly expanded section on signage.[3] The Access Board has also finalized ADA guidelines applicable to children's facilities.[4]

An ad hoc committee of the Access Board and a regulatory negotiation group are developing guidelines for recreation, including miniature golf, hiking trails, boating docks, and amusement park rides. Another advisory committee is working on guidelines applicable to passenger facilities on boats and cruise ships.

The board is a member of the American National Standards Institute (ANSI), a private code-setting group that develops technical standards for model building codes. The Access Board has worked with the ANSI committee to recommend uniform wording between the two standards. While the recommendations for changes in the ADAAG are not identical with provisions of the model code, the board is working to harmonize the ADAAG with the model codes. Consistency is important, because states adopt the model building codes. The Access Board strives for quality and fairness, and has generally been recognized as achieving it, although it has occasionally received some criticism from the disability community for taking positions viewed as unnecessarily weak.

6.3.1 Findings and Recommendations

Finding 52: The Access Board produces an impressive volume of work of high technical quality.

Finding 53: The Access Board is to be commended for its work to harmonize the ADAAG changes with the model building code developed by the American National Standards Institute (ANSI). Consistency is important, because states adopt the model building codes.

Finding 54: The Access Board strives to represent all interest groups fairly and forcefully; individuals in and out of government describe the board's work as authoritative and unbiased, and, because of its good reputation, it is designated to develop guidelines and standards in new laws.

6.4 Relationship Among the Access Board, the Department of Justice, and the Department of Transportation

While the Access Board is charged with developing ADA accessibility guidelines, DOJ and DOT use the guidelines to develop standards that are issued as regulations. This division of roles appears to generate occasional tension among the entities and disagreement from time to time about technical and interpretive matters. For example, DOJ appears to have supported adding ADAAG guidelines on courthouses, detention facilities, public housing, and public rights-of-way (streets and sidewalks) but decided not to adopt the section on public rights-of-way as part of the ADAAG after opening it to public comment. Despite this reluctance (apparently stemming from concern about potential backlash) several states have adopted the interim guideline without DOJ's having approved it. In an effort to provide technical assistance to these states, the Access Board has developed a manual using words such as "should" instead of "shall" to help them and others interpret and use the guidelines appropriately. While staff members indicated that such a strategy would strengthen the implementation phase if DOJ elects to issue the rule, because some localities will already be familiar with it, their divided role on this issue seems inefficient.

Staff members of the Access Board reported their opinion that DOJ sometimes issues inaccurate technical assistance materials, resulting, in part, from DOJ's failure to consult, in these circumstances, with the Access Board. For example, apparently both DOJ and the Access Board agree that DOJ's manual on access standards for vessels is incorrect, but DOJ says it cannot change the manual, although, according to staff members of the Access Board, it provided no specific reason. Researchers were told by staff members of the Access Board that if the board and DOJ were to collaborate routinely, they would agree on most significant issues.

Some Access Board staff members indicated that they would have preferred it if the ADA had conferred authority on the board to issue regulations. The twofold process whereby the board develops the guidelines and DOJ (and DOT) issue them as final rules, they believe, hampers the board's decision-making authority.

Staff members noted that both DOJ and DOT have a great deal of influence over what goes into final accessibility guidelines, because each is ultimately responsible for issuing final rules. The agencies will not adopt a rule they are unable or unwilling to enforce. While DOJ frequently prevails on issues over which its staff members have strong views, it is occasionally overruled by other board members. The Access Board usually cooperates when asked by DOJ to make editorial changes to rules under development. Although tensions have sometimes arisen in the past, DOJ and the Access Board appear to be working more cooperatively now. Staff members reported that the Access Board also has a reasonably good relationship with the Office of Management and Budget (OMB), which must approve all final rules.

6.4.1 Findings and Recommendations

Finding 55: The twofold statutory process in which the Access Board develops guidelines and DOT and DOJ adopt them as standards presupposes effective cooperation and collaboration between the Access Board and DOT and DOJ; where such cooperation and collaboration is lacking, the standing, authority, and effectiveness of the Access Board are weakened.

Finding 56: Effective collaboration between DOJ and the Access Board has been inconsistent over time.

Recommendation 94: DOJ and DOT should step up efforts to work with the Access Board to coordinate policy positions before guidelines are issued and technical assistance materials are finalized.

6.5 Policy Issues Regarding Access to the World Wide Web

Under Section 508 of the Rehabilitation Act, the Access Board is charged with developing standards (rather than guidelines) for all types of electronic and information technology used or acquired by the Federal Government (e.g., fax machines and copiers, as well as computers and computer software). These standards will be incorporated in the Federal Acquisitions Regulations, which cover every type of information technology the Federal Government purchases, including technology used by employees and technology used by the public to obtain information from federal agencies. Under its Section 508 mandate, the Access Board is also developing mandatory standards for Web sites. They will require text alternatives for all Web graphical materials, closed-captioning for video materials, and descriptions of sound materials. These, too, will be incorporated into the Federal Acquisitions Regulations. While the Section 508 Web site standards will not apply directly to private sector Web sites, the Federal Government is a major purchaser of information technology. Such purchasing power will likely have a significant impact on development of Internet products used to develop Web sites.

The Access Board also plans to adopt the World Wide Web Consortium standards being developed under the Web Accessibility Initiative. The director of that initiative is a member of the Access Board's advisory committee working on the Section 508 accessibility standards. The World Wide Web Consortium includes technology companies such as Sun Microsystems and Microsoft, who cooperate to develop voluntary standards to ensure that technologies work together. While the participation of the Access Board is not critical to the development of these voluntary standards, the board's presence is an asset because it serves to educate the members about accessibility issues for people with disabilities.

For some time, DOJ has been studying whether Web sites that engage in commerce are covered by ADA. The development of Web site standards by the Access Board presents a unique opportunity for collaboration with DOJ, which may have concerns about the political and practical implications of requiring businesses to have accessible Web sites. If the Section 508 standards create enough momentum in the private marketplace for accessible Web interfaces, DOJ may have less cause for concern about the reaction of business interests to a requirement that their Web presence be accessible, because the technology required to provide access either will be well under development or already established.

6.5.1 Findings and Recommendations

Finding 57: The Access Board is taking a leadership role in developing Web site accessibility standards in conjunction with government and industry leaders.

Recommendation 95: DOJ and the Access Board should coordinate their efforts regarding World Wide Web accessibility.

6.6 Decision Making and Resources

Staff members suggest that the structure and composition of the board is both a strength and a weakness. While members represent differing interests and perspectives, which builds wider acceptance for decisions, private members express frustration at the length of time it takes for the government members to take action. Sometimes private members' terms expire before they see their work completed. Another important problem the Access Board continues to face is its increasing authority and responsibility for development of guidelines and standards without commensurate funding increases.

6.6.1 Findings and Recommendations

Finding 58: Some rulemaking takes so long that private board members, whose terms are four years, do not stay on the board long enough to see the completion of their efforts.

Finding 59: The Access Board is required to assume new responsibilities without additional funding, as new laws establish new responsibilities for the development of technical standards and guidelines.

Recommendation 96: When new laws require the Access Board to develop guidelines or standards, Congress should allocate increased funds for the work.

6.7 Technical Assistance

The Access Board operates a toll-free telephone hotline and a Web site that is accessible to individuals with vision disabilities (http://www.access-board.gov/). A separate toll-free number is available for callers using TTYs. Technical assistance questions can also be sent by fax or e-mail. At present, the agency is unable to provide direct technical assistance responses by e-mail. The Access Board also maintains a computer bulletin board.

Most calls to the hotline are concerned with architectural, rather than transportation or communication, issues. Callers include builders, architects, and people with disabilities. Technical assistance calls appear to raise more complex issues and questions now than immediately after ADA was first enacted. While the Access Board does not perform plan verifications or offer legal advice, it does respond to questions as, for example, about a design received by fax. The Access Board generally provides technical assistance to the public promptly and efficiently. If callers' questions are especially complicated or difficult, they are referred to DOJ. To help users obtain information from either agency as appropriate, the Access Board and DOJ have linked their respective Web sites.

The Access Board develops its own technical assistance publications and documents as it identifies the need for them. These documents are sent to DOJ for review. Researchers were told that the Access Board seldom receives comments from DOJ. If no comments are received, staff members assume the documents are acceptable. When comments are received, DOJ most frequently suggests changes to the technical language or asks for clarification on an issue. Materials are available in alternative formats on request. *Access Currents*, a newsletter published by the Access Board, is available in braille, on disk or audiotape, and in large print. Technical assistance documents and the overall ADA technical assistance activities of federal agencies are discussed in chapter 8.

Endnotes

1. 42 U.S.C. §§ 4151–57.

2. 42 U.S.C. § 12204(a).

3. ADAAG Review Federal Advisory Committee, Final Report. "Recommendations for a New ADAAG."

4. Federal Register: ADA Accessibility Guidelines for Buildings and Facilities: Building Elements Designed for Children's Use; Final Rule. Establishing alternate specifications for building elements designed for use by children. 1998.

7. OTHER ADA FEDERAL TECHNICAL ASSISTANCE ACTIVITIES

This chapter provides a descriptive report on the technical assistance activities by the President's Committee on Employment of People with Disabilities (PCEPD) and the National Institute on Disability and Rehabilitation Research (NIDRR) ADA Technical Assistance Program. These agencies do not have enforcement authority for ADA, but the statute empowers the attorney general to obtain their assistance in carrying out its technical assistance duties. Each engages in a variety of technical assistance activities. While their activities were not formally evaluated for this report, information about the scope and focus of their programs, and a few observations and conclusions, are included to provide a more complete picture of federal ADA-related technical assistance and public information activities.

Information was collected through personal interviews, reviewing current reports or publicly available materials describing agency activities, and collecting quantitative data when they were available. Technical assistance and public information materials titles were also collected from numerous sources. A description of these materials appears in chapter 8, along with an analysis, findings, and recommendations. The information about the technical assistance activities of the four enforcement agencies, taken together with this chapter and the information on technical assistance materials in the next, presents a fairly comprehensive overview of federal ADA technical assistance activities and serves as a foundation for the findings and recommendations presented elsewhere in this report.

7.1 President's Committee on Employment of People with Disabilities

The President's Committee on Employment of People with Disabilities (PCEPD) is a small federal agency whose mission is to facilitate the communication, coordination, and promotion of public and private efforts to enhance the employment of people with disabilities. The committee provides information, training, and technical assistance to businesses, organized labor, rehabilitation and service providers, advocacy organizations, families, and individuals with disabilities. The PCEPD reports to the president on the progress and problems of maximizing employment opportunities for people with disabilities.

The chair and vice chairs of the committee are appointed by the president. The chair appoints the other Executive Board members and members of the six standing subcommittees. Directed by the chair and executive board, the committee achieves its goals through the work of its subcommittees and a 37-member agency staff, in close cooperation with the Governor's Committees in the states, Puerto Rico, and Guam and with Mayor's Committees throughout the United States.

The committee

- Provides information on the Americans with Disabilities Act (ADA).
- Initiates projects and initiatives, intended to increase the number of people with disabilities in the workplace.
- Sponsors periodic employment fairs for job seekers with disabilities.
- Provides free publications and fact sheets on disability employment-related issues.
- Reports to the President on the progress and problems of maximizing employment opportunities for people with disabilities.

Each year, the committee develops and implements various projects that are designed to improve work opportunities for people with disabilities.

The following subsections provide a brief description of some examples of PCEPD activities specifically related to ADA.

7.1.1 Cultural Diversity Initiative

A joint initiative of the U.S. Department of Education's Office of Special Education and Rehabilitative Services (OSERS) and organizations of persons from culturally diverse backgrounds, the committee's Cultural Diversity Initiative seeks to improve employment opportunities for persons with disabilities from diverse cultural backgrounds. A part of this project includes training individuals with disabilities from diverse cultural backgrounds, who in turn will be able to educate others in their respective communities on ADA, disability employment issues, and competition for grants funded under Titles I through VIII of the Rehabilitation Act.

7.1.2 Outreach to Small Business

This project is designed to educate small and medium-size businesses about the requirements of ADA; the benefits of hiring, retaining, and promoting people with disabilities; and resources that can assist businesses in hiring, retaining, and promoting workers with disabilities.

7.1.3 Job Accommodation Network

The Job Accommodation Network (JAN) is a free-of-charge information and referral service on job accommodations for people with disabilities; on the employment provisions of the Americans with Disabilities Act; and on resources for technical assistance, funding, education, and services related to the employment of people with disabilities. In addition, JAN analyzes trends and statistical data related to the technical assistance it provides. JAN can be accessed by phone (toll-free) or Web site (www.jan.wvu.edu/english/homeus.htm). According to PCEPD, more than 100,000 callers have received information during the past three years. Fifty-two percent of employers report that, following consultation with JAN, they were able to hire or retain a qualified employee with a disability. PCEPD reports that calls are handled by consultants who have access to a large databank of strategies and products proven effective in the workplace.

Of the various ADA and related telephone information services operating with federal support, JAN appears to obtain, record, and track the most data about the type and outcome of calls. Every call received on the toll-free voice hotline is documented. Callers seeking brochures or for whom a referral is appropriate are not reported as "cases." Specific requests for ADA information or accommodation are counted as cases. Examples of information collected include number of calls and cases handled, number of electronic calls, number of cases by state, status of the caller (e.g., employer, person with a disability, rehabilitation professional), the individual's employment status, number of employees in the business, functional limitations of the person with a disability, type of business or agency, ADA-related concerns, and information about how callers heard about JAN. Data are also collected about the number and type of materials mailed.

Detailed information and data about JAN's activities are available on the Web site. JAN performs an ongoing evaluation that it hopes will help measure outcomes such as job acquisition or retention related to the information provided to callers. JAN also has the capacity to analyze its data and apply the outcomes to develop policy recommendations, public relations strategies, and model programs.

Examples of the categories of data JAN collects are contained in Table 7-1 and Table 7-2.

Table 7-1

Employment Status/Issue of People with Disabilities Who Were Callers or the Subject of Calls for a Sample Quarter, 7/1/99 – 9/30/99

Person's Employment Status/Issue	**Number in Category**
Advancement or promotion	1
Hiring a new worker	4
Individual enrolled in a training program	4
Individual seeking job placement	12
Improve work environment for current employee	67

Table 7-2

JAN Cumulative Data for a Sample Quarter

Activity	**7/1/1998 - 9/30/1998**
Calls received	9,525
Number of cases handled	8,488
Internet contacts	258,086
Outreach/materials dissemination	36,373

7.1.4 Conclusion

The President's Committee on the Employment of People with Disabilities supports several useful programs. The outreach to small businesses and the Cultural Diversity Initiative are noteworthy. The Job Accommodation Network is an especially important source of technical assistance for implementation of Title I of ADA. According to JAN's reports, people with disabilities are benefiting directly from the service in terms of hiring and job retention; JAN is attempting to collect information about outcomes to help evaluate the effectiveness of the program; and public information and materials about JAN are readily available and thorough.

7.2 National Institute on Disability and Rehabilitation Research

ADA assigns the federal agencies responsible for enforcing the act responsibility for providing technical assistance to individuals and institutions that have rights and duties under its respective titles. While the National Institute on Disability and Rehabilitation Research (NIDRR) of the U.S. Department of Education has no enforcement responsibility for ADA, it has, since 1978, "…supported research to improve the employment status and promote the independence of persons with disabilities."[1] Based on this experience, Congress found it appropriate to provide additional funds to NIDRR to support a technical assistance program related to ADA.

7.2.1 NIDRR ADA Technical Assistance Program

NIDRR has funded three major types of technical assistance programs since 1991: the ADA Technical Assistance Coordinator (ADA-TAC); Disability and Business Technical Assistance Centers (DBTACs); and National Training Projects (NTPs). Before 1996, NIDRR also funded projects that developed and tested technical assistance training materials and programs for use by the DBTACs and NTPs. Occasionally special and field-initiated research (FIR) projects are also funded to meet a specific identified need, such as capacity building to increase ADA information for the Latino and certain Asian communities. NIDRR spent about $7 million in FY 1998-99 on technical assistance programs.[2]

7.2.1.1 ADA Technical Assistance Coordinator Contract

The ADA-TAC program enhances the performance of the DBTACs and NTPs by coordinating the activities of the ADA technical assistance grantees among themselves and between the grantees and appropriate federal agencies, helping the grantees in their technical assistance and material development activities, promoting the efforts of the DBTACs through a public relations campaign, and reporting the various activities of the technical assistance grantees.

7.2.1.2 National Training Projects

The NTPs offer training to persons with rights and duties under ADA to enhance their awareness of (1) the provisions of ADA; (2) their rights and duties under the act; (3) effective ways in which the employment, public services, public accommodations, and telecommunication provisions of the act can be implemented; and (4) local and national resources available for expert assistance in resolving issues such as interpretation, reasonable accommodations, or technical aspects of compliance that may arise concerning the provisions of ADA.[3]

7.2.1.3 Disability and Business Technical Assistance Centers

Ten DBTACs, funded through five-year grant cycles, are located in each of the 10 Department of Education administrative regions. The DBTACs answer technical questions, make referrals, and disseminate information and materials. In addition, the DBTACs perform activities to promote awareness of ADA. The DBTACs provide ADA training and technical assistance to covered individuals and entities to facilitate employment for individuals with disabilities and accessibility in public accommodations and government services. NIDRR staff report that each DBTAC has three to four staff members and an annual budget of between $500,000 and $700,000. Because they have limited resources, NIDRR encourages the DBTACs to build relationships with local and state organizations and entities to leverage their capacity to meet the needs of their respective clients.

NIDRR reports that the DBTACs responded to 91,534 ADA-related inquiries in 6,136 hours of calls during the 1997 reporting period. Approximately 70,000 persons received some type of ADA training during the period through the combined efforts of the DBTACs and the NTPs. Table 7-3 shows the types of groups trained.

Table 7-3

Types of Groups Trained by DBTACs and NTPs

Groups	% of Total
Public entities	28
Disability entities	15
Service providers	10
Business entities	21
Individuals	19
Other	7

DBTAC Technical Assistance

According to the annual report, the DBTACs provided technical assistance in 180,909 instances during the reporting period. Forty-one percent were consultations, 18.3 percent were referrals, and 40.4 percent involved dissemination of information. Table 7-4 lists the kinds of groups that received technical assistance.

Table 7-4

Groups That Received DBTAC Technical Assistance

Group	% of Total
Public entities	14.4
Disability entities	25.3
Individuals	26.6
Business entities	24.4
Other	9.6

Public Awareness and Dissemination of Materials

The DBTACs also report engaging in public awareness activities, including developing public service announcements and tailoring outreach activities to the Latino and other culturally diverse communities. They also report distributing 785,695 ADA publications during the reporting period.

Web Site Activities

All the DBTACs reported having a Web site in operation during the reporting period. While a total of 108,999 visits to the sites were reported, that figure is incomplete because data were not readily available until late 1997. Further, the NTPs were not required to report numbers of visits to their sites. The ADA-TAC reported 12,524 visits to its Web site. The ADA-TAC site has links to all key federal ADA sites, an ADA publications page that lists all DBTAC-disseminated materials, and a list of other disability-related sites.

Table 7-5 shows total categorical activities of the DBTACs for the reporting period.

Table 7-5

Total Activities of the DBTACs by Category

DBTAC Activity	# of Activities/Materials Distributed
ADA-related inquiries	91,534
Technical assistance efforts	180,909
ADA publications distributed	785,695
Web site visits	108,999
ADA training	70,000

Program Evaluation Activities

Several years ago, NIDRR began to measure outcomes related to ADA technical assistance efforts. NIDRR reasoned that while it is important to record and report the amount and type of technical assistance the DBTACs provide, it is also becoming increasingly important to understand what impact the various technical assistance activities are having and whether people with disabilities and other customers are experiencing and reporting a benefit or positive outcome.

In 1998, NIDRR began a project to collect customer feedback about the effectiveness of the DBTACs' technical assistance activities. The ADA Impact Measurement (AIM) project is housed at the Colorado DBTAC. The project has developed a survey that is being administered by DBTAC staff nationwide. Telephone interviews are being conducted with persons who have used the DBTAC service to learn how effective the information or assistance was. Interview data are recorded on the project's secure Web site. Postcards requesting the same information are also being sent out with materials packets. These are returned voluntarily by the recipients. Data have been collected for three calendar quarters, but analysis has not yet been conducted.[4] Outcomes from this research will be very useful in helping to determine future program directions.

Limitations on Scope of Activities

Some DBTAC staff members are frustrated by the limits NIDRR places on their activities. Staff are not allowed to advocate when a caller has not succeeded in resolving an issue alone. They are prohibited from consulting with attorneys, serving as expert witnesses, or accompanying a client to mediation. Without the authority to step up their efforts after clients have exhausted their self-advocacy options, the DBTACs must abandon clients to fend for themselves, which is especially frustrating in locales where alternative legal or advocacy services are scarce.

Systemic Issues

Other frequently expressed concerns include inconsistency in the quality of information the 10 centers provide, absence of a mechanism to obtain legal case summaries affecting specific states and regions, difficulty in developing attorney referral lists, difficulty in obtaining ADA materials in alternative formats in a low-cost and timely way, and the lack of a genuine continuum of assistance and support for people with disabilities to help them resolve complex or difficult ADA violations.

7.2.2 Conclusions

According to the annual report, the DBTACs appear to be providing a significant amount of information and referral services to individuals with disabilities and covered entities on modest budgets. While NIDRR has begun to evaluate the outcomes of the DBTACs' technical assistance activities, the ban on certain advocacy activities appears to prevent some centers from providing more services on a broader continuum, especially where alternatives are scarce. Consistency and the quality of information being provided may be an issue. Significant use of the relatively new DBTAC Web presence suggests that this is an untapped resource for disseminating technical assistance information.

Endnotes

1. NIDRR ADA Technical Assistance Program Fiscal Year 1997 Annual Report

2. Interview with Joseph DePhillips, rehabilitation program specialist, U.S. Department of Education, NIDRR

3. NIDRR 1997 ADA Technical Assistance Annual Report, p. 3

4. Interview with Robert Gattis, ADA Impact Measurement project manager, Rocky Mountain Disability and Business Technical Assistance Center.

8. TECHNICAL ASSISTANCE MATERIALS AND FINDINGS AND RECOMMENDATIONS FOR TECHNICAL ASSISTANCE AGENCIES

8.1 Introduction

This chapter provides an overview of ADA technical assistance materials developed by the four principal ADA enforcement agencies and by other federal agencies that engage in ADA technical assistance. It also presents findings and recommendations related to the materials and sets forth general findings and recommendations related to ADA technical assistance overall.

8.2 ADA Technical Assistance Materials

Federal ADA enforcement agencies—the Equal Employment Opportunity Commission, the Department of Justice, the Federal Communications Commission, and the Department of Transportation—as well as the Access Board, create or contract for the development of technical assistance materials to help persons with disabilities and covered entities understand their rights and responsibilities under the law. Shortly after the ADA was passed, a significant number of materials were created either by the agencies themselves or by grantees or by contractors. Since then, some materials have been updated, additional materials have been developed by the enforcement agencies and other federal agencies, and an increasing number of titles have been translated into languages other than English. Newer materials help clarify changes in interpretations of the law, respond to new issues and better explain and clarify others, relate to technology changes, and address specific audiences such as older persons with disabilities and day care operators. In an effort to understand the scope of currently available ADA technical assistance materials created with federal support, a catalogue of ADA technical assistance materials was compiled, as described in the following section.

8.2.1 Identification and Cataloging Approach

First, materials were sought from the federal agencies themselves: EEOC, DOJ, the Access Board, the FCC, several Title II enforcement agencies, and from the allied agencies and organizations providing technical assistance, including NIDRR, Project ACTION, the DBTACs, and the PCEPD. Titles of materials were collected primarily from Web sites, paper lists of resources, and searches of databases that listed ADA materials by title. Second, a database was created by this project that assigned all the titles gathered to one of two audience categories. The first category is for general audiences, and the second is for individuals with disabilities. Many, if not most, of the general audience titles are important and useful to persons with disabilities but were not developed specifically for them. On the other hand, titles assigned to the second category appeared to have been created explicitly for people with disabilities. Indicators such as the text of the title, text of the summary or abstract, source, and keywords were used to help determine where to assign the title. Information on products such as curriculum guides, project summaries, and model projects discussed in workbooks or packets is included. Third, the titles were assigned to the following seven ADA subtopic categories: Titles I through IV, Accessibility Guidelines, Transportation, and General. For uniformity, transportation-related technical guidelines and documents were included in the transportation category rather than with accessibility guidelines.

The database created for this project also noted whether the materials are available in languages other than English and whether or not the source indicated that the materials are available in alternative formats such as audiotape, disk, large print, or braille. The database only included a notation about availability of materials in alternative formats if the source explicitly lists the format. In some situations, sources advertised that all of their materials are available in alternative formats on request, but it was unclear whether *all* formats are available or how long it takes to obtain a document in the required format. In these situations, the title was not listed as available in an alternative format. The rationale for this decision was that materials made available by the Federal Government should be as readily available for people who are blind or who have vision impairments as they are for others. The database also noted when the full text of a document is available at a Web site. When a title is available in Spanish or another non-English language, it also was noted. In some situations, a title could be assigned to more than one category; a judgment was made about where to place it to avoid duplication. Some useful titles were omitted because they were generated without federal support.

While many ADA and related resources were identified and collected, it should be noted that it is difficult to maintain an up-to-date collection of titles, because the various agencies and sources that publish and make these materials available are constantly changing and updating their title lists and directories. DOJ, for example, had a number of titles under development that were not included. Further, the list did not contain every work on an ADA topic funded with federal support. For example, additional ADA-related federally funded titles were collected from the National Rehabilitation Information Center (NARIC) database, but they were not included, because many are primarily academic in orientation. However, they are part of the federally supported ADA public education effort. Many titles related to Section 504 were also not included. A few useful out-of-print titles were included, because they can be ordered from the National Technical Information Service.

8.2.2 Overview of ADA Technical Assistance Materials

The value of this compilation was less as a comprehensive resource than for the general themes it reveals regarding the direction of the federal ADA materials development effort.

- 547 ADA-related titles were included in the resource list.
- 506 titles appear to be intended for either a general audience (including people with disabilities) or a covered entity.
- 41 titles appear to have been specifically created for persons with disabilities.
- 313 titles (57%) are readily available in some alternative format, such as large print or disk.

- 24 titles are videos.
- 66 titles (12%) are available in languages other than English.
- 218 titles (almost 40%) are available in full-text format on the Web.

Table 8-1 shows the breakdown of materials by ADA category, audience, readily available alternative format, and availability of the title on disk, in full-text format on a Web site, and in Spanish and other languages.

Table 8-1

Technical Assistance Materials by Topic, Audience, Alternative Format, Availability on Disk, in Full-Text Format on a Web site, in Spanish and Other Languages

	Title I	Title II	Title III	Title IV	Access. Guides	Transit	General	Total
Audience								
General	146	50	81	3	44	130	52	506
Person with Disability	15	9	4	-	-	10	3	41
Alternative Format								
Large Print	50	5	9	-	20	10	7	101
Braille	4	1	2	-	4	4	11	26
Audio	16	3	13	-	13	4	13	62
Video	1	3	8	-	-	10	2	24
Disk	48	4	11	-	15	12	10	100
Web (full-text)	135	9	12	-	5	37	20	218
Spanish	15	3	18	-	1	-	16	53
Other language	1	1	4	-	-	-	7	13
Total	161	59	85	3	44	140	55	547

8.2.3 Interpretation of Materials Compilation

The most important observation stemming from the process of compiling information about ADA-related materials is that the resources cannot all be found in one location. Several technical assistance providers have extensive collections (DBTAC, NARIC), but none lists all the titles contained in the resource list.

Over 56 percent of the titles are readily available in alternative formats of some kind, and a significant additional number are available in some accessible format on request.

It is not surprising that only 42 titles have been created explicitly for persons with disabilities; that number is both useful and misleading. It establishes the extent to which the ADA enforcement agencies and other agencies providing technical assistance have identified as a priority the development of materials specifically for people with disabilities. Nevertheless, many of the general titles are important resources for individuals with disabilities; still others are regulations and guidelines required by the statute and are also important resources to persons with disabilities, as well as covered entities.

Almost 40 percent of the titles are available in full-text format on the Internet. This technological advance is vitally important, because the Web holds the promise of reaching so many people at such a low cost.

The titles reveal a serious effort by some of the agencies to provide basic information in languages other than English. For example, DOJ has some basic materials available in such languages as Arabic, Armenian, Chinese, Hindi, Khmer, Korean, Russian, Spanish, Tagalog, and Vietnamese. While the transit category contains 140 titles, only 10 were specifically created for people with disabilities. Only three Title IV titles were identified, none earmarked specifically for people with disabilities.

8.3 Effectiveness of Current Technical Assistance Activities

Several overarching themes emerged from the review of ADA technical assistance activities. The technical assistance programs that answer questions from the public appear to provide significant amounts of information and materials to diverse audiences. New materials are being developed to meet evolving needs to the extent resources are available. Coordination and legal review of new materials, however, does not always take place consistently.

The enforcement agencies do not make sufficient effort to evaluate the effectiveness of their technical assistance programs, although they may require their grantees and contractors to do so. Every agency can show it has distributed high volumes of materials, and answered hundreds of thousands of telephone questions, yet most have not evaluated the impact or outcomes of these activities. In contrast, the President's Committee on Employment of People with Disabilities collects data and publishes outcomes on technical assistance provided by the Job Accommodation Network, and, through the ADA Impact Measurement project, NIDRR has initiated a basic evaluation process regarding the DBTACs, although no results are available yet. Such evaluation efforts are not necessary to justify the need for continued technical assistance and public education, because the demand for such programs can be readily demonstrated, but there is a critical need to understand how effective various activities and programs are so future technical assistance can be targeted for the greatest impact.

Researchers identified one problem or tension that community advocates have long been aware of. Technical assistance, an important component in any successful disability rights enforcement strategy, has historically been defined as a fundamentally neutral or passive endeavor. This view presupposes that information is power and leaves it to the recipient of the technical assistance to take the information provided and use it on his or her own behalf. At times, however, self-advocacy may be insufficient to solve the problem or end an act of discrimination. In theory, if self-advocacy fails to resolve an ADA discrimination matter, the next step is to file a complaint with the appropriate agency. In many situations, however, particularly with respect to Title III complaints, an individual complaint may have relatively little chance to rise to the level where DOJ will investigate it. DOJ might refer it to mediation, but many complainants consider mediation without some form of assistance as too intimidating. Without advocacy assistance of some kind, the complainant is again on his or her own to resolve the problem, initiate litigation, or perhaps abandon it altogether. Trained and compensated advocacy assistance has been shown to bridge the gap for many people with disabilities when problem solving through information dissemination fails and the alternatives of federal agency complaint filing and investigation, or filing a lawsuit, are not realistic options.

Web-based information offers new opportunities for increasing technical assistance. Those programs that have moved to Web-based technologies are increasing their contact with potential customers and are making it easier for information seekers to find what they need quickly.

8.4 Findings Regarding Technical Assistance Materials and Technical Assistance Agencies

Finding 60: Technical assistance materials are not centrally located; rather, they are widely dispersed throughout many agencies and organizations.

Finding 61: A significant proportion of technical assistance titles are available in alternative formats.

Finding 62: A significant number of titles are available in full-text format on the Internet.

Finding 63: Relatively few materials on the subject of ADA and transportation have been created specifically for use by people with disabilities. Likewise, few titles have been produced to help people understand the requirements of Title IV and the relay service.

Finding 64: Some agencies are making a serious effort to provide basic information in languages other than English.

Finding 65: Overall, technical assistance programs provide significant amounts of information and materials to diverse audiences.

Finding 66: Agencies too often do not engage in coordination and legal review of new materials.

Finding 67: The enforcement agencies' efforts to evaluate the effectiveness of their technical assistance programs have been few and inadequate.

Finding 68: Trained and compensated advocacy assistance is needed to bridge the gap for many people with disabilities between problem solving through information dissemination and the alternatives of filing a complaint or litigating.

Finding 69: Those programs that have moved to Web-based technologies are increasing their contact with potential customers and are making it easier for information seekers to find what they need quickly.

8.5 Recommendations for Technical Assistance Materials and Technical Assistance Agencies

Recommendation 97: Congress should fund an ADA and Section 504 technical assistance and information clearinghouse whose purpose is to collect and catalog the widely dispersed ADA and Section 504 resources, and coordinate distribution with the technical assistance agencies.

Recommendation 98: While significant progress has been made making technical assistance materials available in alternative formats, all federally funded materials should be readily available in alternative formats, and the Department of Justice should take appropriate steps to ensure that this occurs.

Recommendation 99: The Department of Justice should initiate a collaborative effort with the ADA technical assistance agencies to make all compatible ADA materials available in full-text, audio, or video formats on the Internet.

Recommendation 100: The Department of Justice should convene a task force to determine how to structure, fund, and institute an ADA advocacy initiative that spans the gap for assistance to complainants between where technical assistance leaves off and litigation begins. Congress should provide the funding necessary to implement this initiative.

Recommendation 101: The FCC should significantly increase public information/outreach efforts to increase general public and specific population awareness of the relay service.

Recommendation 102: DOT should significantly increase its commitment to providing ADA transit-related materials and training targeted to people with disabilities in culturally competent formats.

Recommendation 103: Those programs not already doing so should evaluate the effectiveness of their ADA technical assistance to determine whether their work is having the desired outcomes and should redirect resources on the basis of the results.

Recommendation 104: Within the limits of their statutory authority, the technical assistance organizations should collectively develop a coordinated strategic plan for advancing the understanding and implementation of ADA in the future.

9. MEDIA COVERAGE AND DEPICTION OF ADA

Despite a notable increase in media coverage publicizing ADA's positive impact on the lives of people with disabilities, negative stories that distort or misrepresent the purposes of ADA persist. A review of media coverage and depiction of ADA issues reveals some disturbing themes. Many ADA news reports and entertainment features contain the mistaken belief that Congress enacted the law without fully understanding who it intended to cover, and demonstrate a poor comprehension by journalists of the basic provisions of the statute. Many in the media assume that the provisions of ADA were first created in 1990, when the law was enacted. They appear wholly unaware that ADA extended the basic requirements of a predecessor law, Section 504 of the 1973 Rehabilitation Act, to private businesses.

Many reports about the ADA protections emphasize who is protected rather than focusing on conduct giving rise to discrimination. Overwhelmingly, news reports and entertainment features focus on ADA litigation rather than showing voluntary compliance or explaining the benefits of the law for people with disabilities. In this context, it comes as no surprise that numerous print and electronic media reports suggest the law is being abused, misapplied, or misinterpreted or has generally run amok. Federal agencies charged with ADA enforcement have failed to muster enough commitment and momentum to challenge and correct these negative, inaccurate, and damaging reports.

ADA incorporated many of the basic provisions of Section 504, enacted 17 years *before* ADA, and applied them to private businesses. The 1977 regulations implementing Section 504 define whom the law protects as well as many of the basic principles that apply to employer conduct and govern architectural, transportation, and communication access. Lack of media attention to this predecessor law accounts in part for the dismal trends in ADA reporting.

A crucial disconnect between media reports on the law and the real intent of ADA, stems from persistent emphasis on disability instead of discriminatory actions. Although damaging and inaccurate, such confusion is understandable. ADA is not the dominant disability policy in the United States with which most people are familiar. Rather, for decades, the public has been exposed to and accepts the system of disability benefits whereby disability is equated with inability to work. According to the benefits model, the more severe the condition, the more deserving of benefits the person is; and the less severe, the less deserving.

The media often also incorrectly overlay the more familiar "severity of disability" benefits analysis on the ADA issue as a means of understanding and reporting about disability, while downplaying the discriminatory conduct. The media and the general public do not appear to understand that two policy models—civil rights and benefits—operate simultaneously and autonomously, each having evolved in response to very different historical conditions, needs, and perspectives.

9.1 Negative or Inaccurate Media Coverage

In a study of 80 radio and TV programs aired primarily in 1998, Cary LaCheen of New York University School of Law observed a significant focus by the electronic media on disabilities widely perceived to be "undeserving" and on difficult or meritless cases. The media appear to define the undeserving as those who blame their conditions for their circumstances, people with hard-to-verify or easy-to-fake conditions, and people with conditions that many view as "medicalized" descriptions of lifestyles and behaviors. According to LaCheen, five disabilities fall into these categories: obesity, substance abuse and alcoholism (and addictions generally), psychiatric disabilities, multiple chemical sensitivities, and learning disabilities.[1]

She illustrates such misperceptions in the following examples from stories appearing on major television network programs.

- The man who brought a loaded gun to work and claimed he was protected by ADA because he had a psychiatric disability: [*ABC News Special: The Blame Game* (ABC television broadcast, John Stossel reporting, August 17, 1995)].

- An obese woman who sued a movie theater because she could not fit in the seats: [*Crossfire: Casey Martin Wins Big in Court with ADA* (CNN television broadcast, February 13, 1998)].
- The obese transit worker who was denied a promotion to train operator when he failed a stress test, then sued claiming discrimination: [20/20: How Americans with Disabilities Law Can Backfire (ABC television broadcast, John Stossel reporting, August 15, 1997); Headline News, (CNN television broadcast, August 31, 1998)].

All three of these cases were dismissed, but this fact was not mentioned in any of the stories.

The following examples emphasize the prevalent media perception that ADA covers undeserving people who are using the law as a tactic for personal gain.

- In a Simpsons episode entitled "King-Sized Homer," Homer tries to eat enough to weigh in at 300 pounds so he can work from home and avoid an exercise program at work. He pages through a book called Am I Disabled? and is elated when he learns that "hyper-obesity" is listed. Other conditions listed in the book are "achey breaky pelvis," "lumber lung," and "juggler's despair." The plot even alludes to current events when Homer goes to the movies and finds he cannot fit into a seat. [The Simpsons: King-Sized Homer (Fox television broadcast, November 5, 1995)].
- In a King of the Hill episode entitled "Junkie Business," Hank Hill, a manager in a propane sales business, plans to hire a new employee. He rejects a highly qualified Hispanic woman in favor of Leon Petard, a young man whose only qualification is that he is a Dallas Cowboys' fan. Leon comes to work several hours late, has the shakes, is nauseated, and does not do any work. He is a substance abuser. Hank fires Leon, telling him to get some help. Leon sues Hank for disability discrimination. Eventually everyone in the office claims to have some sort of disability to get out of working. Hank himself finally quits to bring the number of employees in his company to under 15 so ADA will not apply to his business.

While mocking the perceived misplaced intent of the law, these examples also perpetuate incorrect information about the actual requirements of ADA. In the King of the Hill episode, the central premise is patently in error, because ADA does not cover individuals who are illegally using drugs and disability does not exempt employees from performing their jobs.

In the following examples, similar themes appear in the print media. In each case, ADA is depicted incorrectly or various aspects of the law are mischaracterized.

- An article written by Joseph Perkins, appearing in the *West Contra Costa Times* (Northern California), May 15, 1997, "ADA well-intentioned, but its implementation is increasingly unreasonable."

  > "Indeed, when President Bush proudly affixed his signature to the disability-rights legislation, he could hardly have imagined that of all the discrimination complaints filed under the law, most have not come from blind or deaf or wheelchair-bound Americans, but from folks claiming back problems (that's right). Nor could he have imagined that the definition of disability under the law…would be so broadly interpreted as to include drug and alcohol abusers."

- Joseph Shapiro, author of the acclaimed book about the disability rights movement, *No Pity,* wrote an article appearing in *U.S. News and World Report* on July 6, 1998, entitled "The Americans with Minor Disabilities Act."

  > "For better or worse, the ADA has greatly expanded the definition of disability to include chronic and often hidden problems—like bad backs, bad hearts, cancer, diabetes, learning disabilities, arthritis and epilepsy."

- The Libertarian Party issued a press release on February 12, 1998, following the victory of Casey Martin in his ADA lawsuit against the Professional Golfing Association (PGA), in which the court ruled that he was entitled to use a golf cart when competing as an accommodation to leg pain. Entitled "What's next: Federally mandated stilts so vertically-challenged midgets can play professional basketball?"

  > "The ADA is a bureaucratic disease that's getting worse every year – and the only question is which sport or industry will be the next victim?"

- On May 13, 1998, *Readers Digest* published an article by Trevor Armbrister entitled "A Good Law Gone Bad: Drafted with the best of intentions, the Americans with Disabilities Act has created a legal nightmare."

> "Because the law is not working as its drafters intended, experts consulted by *Readers Digest* agree that at the very least our lawmakers should narrow the definition of disability to discourage marginal claims; stop viewing all disabilities as if they were alike; make it clear that no employer has to compromise safety; and insist that employers everywhere receive clearer guidance about their rights and limitations. Walter K. Olson, senior fellow at the Manhattan Institute and Author of *The Excuse Factory*, sums up best the need for these changes. 'The law,' he says, 'has produced spectacular injustice and irrationality.'"

9.2 Conclusions

Negative media reports about ADA persist, in part, because no national educational strategy serves as a counterpoint to the misperceptions and misinformation forming the basis of most news reports and entertainment features. Emphasis by the media on controversial litigation far outweighs reports about solid victories reached in the courts, or other aspects of ADA enforcement and compliance, thus negatively influencing the public's perception of the law. Extreme examples of complaints are featured for their shock value, even when the EEOC or other agencies decline to investigate the allegations. Little or no comparison is made showing the relationship of ADA complaints and complaint outcomes with the discrimination charges filed by minorities or women under other civil rights laws; thus, the number and disposition of ADA complaints are continually reported out of context. Widespread misunderstanding and confusion about ADA's history and purpose causes muddled reporting and erroneous conclusions about the law's utility.

The challenge for the ADA enforcement agencies is to find ways to reverse the negative effects of years of public misrepresentation of the law before public opposition reaches a critical mass. It is journalists who have run amok, not ADA.

Endnote

1. LaCheen, Cary, "ADA Coverage on Television," a paper presented at a symposium on the Americans with Disabilities Act, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, University of California at Berkeley, Boalt Hall School of Law, March 12, 1999.

10. STAKEHOLDER VIEWS OF ADA COMPLAINT HANDLING AND ENFORCEMENT

A small number of people with disabilities who had filed a complaint with the Department of Justice, the Equal Employment Opportunity Commission, or the Department of Transportation were interviewed to obtain some insight regarding how agency enforcement was viewed by those who used the agency complaint process. Most of the people interviewed had called the ADA hotline operated by the Disability Rights Education and Defense Fund (DREDF), and that is the avenue through which they were identified for interview. These individuals had filed complaints under Titles I, II, or III. Several had filed simultaneously with more than one agency (e.g., DOJ and the Department of Education; the EEOC and DOJ). These persons had several patterns of experience in common.

Most of them expressed an enormous sense of frustration. They found dealing with the agencies frustrating. The processes they experienced did not correspond to what they expected, and that created a strong sense of frustration.

Most people reported receiving an acknowledgement within two months of the initial filing of the complaint. However, most complained of receiving little information after that, even when they called the agency to ask about the status of the complaint.

Where complaints were being investigated or efforts at settlement were under way, those who filed complaints were very unhappy about how long it was taking. One woman spoke of a Title III complaint that has become part of a "big case"; however, she filed her complaint in 1994, and there is still no resolution. She was told by the staff at DOJ's Disability Rights Section that although hers was an important case, a case of higher priority was being worked on first. Several people expressed the view that since the issues they raised—involving employment and access to public accommodations or transportation—were vital to work and other activities of daily life, speedy processing was extremely important. Even a 12-month processing period was seen as too slow. A couple people reported a reasonably prompt initial acknowledgment from the

DOJ, which also informed them that the complaint had been referred to another agency. However, processing at the referral agency was viewed as unacceptably slow.

Several had been told by the EEOC or DOJ that their cases had been closed by the agency but that they were free to pursue the case with a private attorney. These individuals felt that the reason for case closure was that their cases were not "big enough" or that the processing of cases was "highly political, not dealt with on their own merit." These comments revealed, especially in the case of Title II and Title III complaints, the expectation that DOJ was obliged to open and investigate, and then negotiate or litigate, every complaint it received. None of them understood the DOJ mandate as allowing the selection of cases for reasons of pattern and practice or national importance. As a result of their experiences with these agencies, however, all those interviewed had the view that DOJ and the EEOC are not really interested in handling the complaints of ordinary people.

In several instances, the complaints about the agency process reflected the fact that the agencies did not communicate well about how processing occurs. One person filed jointly with a Fair Employment Practices Agency (FEPA) and with the EEOC. The FEPA did the processing and made a determination, but the complainant expected the EEOC to independently investigate and determine the complaint. This individual was complaining that the EEOC merely followed the recommendation of the FEPA. The fact that a single investigation and determination for dually filed complaints is standard procedure was apparently not explained. In another instance of poor communication by the federal agency, one of the people interviewed complained about the fact that DOJ referred the complaint out to the Department of Transportation. This referral was not expected, and the reason for it not clearly explained. The complainant interpreted the referral as an effort on the part of DOJ to escape its responsibility.

There were several complaints about the thoroughness of the complaint investigation. In one instance, it was felt that the investigator did not follow up on the information and leads provided by the complainant. In another case, the investigation consisted of a telephone call to the employer.

While most of the people the researchers spoke with had some criticism of the enforcement agency with which they had dealt, some also noted they had encountered staff persons they considered knowledgeable. One individual, who dealt with the EEOC and with a Title II referral agency, reported satisfaction with the competence and interest of the staff members in both agencies. This individual participated in a negotiation that led to a settlement. Since the respondent agency had not yet fully met its negotiated obligation, a subsequent complaint to the enforcement agency may be necessary.

Several persons who had participated in mediation of Title III public accommodation complaints were also interviewed. All of these mediations were successfully resolved, and the complainants reported that they were generally satisfied with the outcome. While in two cases the mediation went quickly, in others it extended over a period of a year or more. Those who participated in a mediation reported that they had received some helpful information from the Department of Justice before the mediation. However, in a couple of cases, the individuals still did not feel prepared or able to appropriately represent their own interests in a mediation. Some additional concern was expressed about the abilities of the mediators and their level of expertise with respect to ADA.

These interviews with a small number of individuals reinforce many of the findings of this report.

- It is important that agencies communicate quickly, often, and clearly with complainants.
- The speed of complaint processing is an important issue; agencies should be engaged in a constant effort to reduce the time it takes to resolve a complaint.
- The complaint investigation process must be more clearly explained to those who have filed complaints. It must occur in a manner that it credible to complainants and respondents.
- There is an enormous gulf between how people with disabilities expect the enforcement agencies to handle their complaints and how they are actually handled. The agencies need to bridge this gulf. In addition to improving communication with complainants about how complaint processing and other enforcement activities are

handled, the agencies should consider modifications to their complaint handling processes.

11. CONCLUSIONS

The preceding chapters have described how each of the federal agencies that has a statutory role in the implementation and enforcement of ADA has approached its task and has assessed the effectiveness of each in performing its task. The choices and outcomes, while in many instances unique to the agency and its specific assigned role, suggest, nonetheless, some overall issues regarding ADA implementation.

As with the earlier civil rights laws, a deeper understanding of ADA and its protections must evolve from policy guidance and case law. The federal enforcement agencies have a key responsibility to advance the interpretation and implementation of ADA through these means. The record so far shows variation in the degree to which the federal agencies have shown leadership, engaged in policy development, and sought to clarify the "frontier issues." Some of these differences in appear to be related to the culture of the agency itself and how it has traditionally framed its mission and defined its constituency. In other cases, resource and administrative constraints, turf conflicts, and other forces within the agency appear to suppress or mute the rigor of civil rights enforcement. There seems in some cases to be a fear of taking risks or too great a concern for potential backlash if a forceful position is taken. In all of the enforcement agencies there is room for improvement with regard to getting out in front on issues and taking proactive leadership positions.

In all the enforcement agencies vary in the extent to which they have made use of policy guidance as a tool for guiding the development of ADA interpretation and implementation. The EEOC is commended for making extensive use of guidance documents to announce and reinforce policy positions. The other federal enforcement agencies, notably the Department of Justice, should follow this lead. At the same time, some of the policies the EEOC has announced in its subregulatory guidance and other documents have been problematic and have contributed to or failed to prevent some unfortunate lines of court decisions.

The enforcement agencies have in common an increased use of mediation. The examination of mediation in the different venues raised many common questions. Mediation holds promise as a method for producing a positive outcome in the face of discrimination, whether it occurs in the workplace, in the context of state or local government services, or in public accommodations. There is, however, a risk that some complainants may not be on a level playing field with the respondent. Making sure that the participants are on an equal plane depends on the skill of the mediator, whether the complainant is alone or comes with the support of an advocate, and whether representation by an attorney is equal (e.g., neither side has an attorney or both are represented). While the increased use of mediation seems to be a good idea, it is crucial that the agencies exercise strong oversight of the mediation process. Such oversight should be focused on ensuring that agreements carry out the requirements of ADA and that mediators are well trained in both in mediation techniques and disability issues and ADA. There should be a cadre of trained and paid mediation support personnel (not attorneys) whose task is to help the complainant through the process of mediation.

An issue faced by all the agencies involves the level of ADA and disability expertise of their staff members. All of these agencies need to ensure that their staff persons are well trained with respect to the requirements of ADA and its evolving interpretation, and are knowledgeable about disability issues as well. Some training has occurred and is continuing to occur. In some instances, however, training has been meager or superficial. Agencies need to commit themselves to training that follows up, refreshes, or updates earlier training. In some of the Title II referral agencies, more efforts are needed to enhance the legal expertise of the investigative and legal staff with respect to ADA jurisdictional issues.

The enforcement agencies all have some relationship with ADA consumers—people with disabilities and disability rights advocates. Greater outreach to these groups is needed, however. The agencies could benefit from greater input from these groups in setting their priorities for policy development and litigation, in determining feasible accommodations, and in identifying areas where additional agency staff training would be helpful. And while there has been some initial training of consumers about ADA, follow-up, refresher, or updated training would be useful. Previous training operated under a "train-the-trainers" philosophy. It is time to train a new cohort.

A great many ADA technical assistance documents have been created. Federal funding through the various enforcement agencies and from other federal agencies has supported the development of these documents. Additional technical assistance is available on reasonable accommodation and architectural issues. It is time to evaluate the overall impact of these technical assistance efforts and engage in some strategic planning for the future. Critical questions include whether technical assistance should be continued in the current model or whether the evolution of ADA requires an evolution in the focus and methods of technical assistance; and whether there should be a national clearinghouse charged with collecting and making available all that has been produced about ADA. An assessment and strategic plan could address these and other questions and chart the future for ADA technical assistance.

The enforcement structure established by ADA requires cooperation, coordination, and collaboration among federal agencies for effective enforcement. This is especially true for Title II but also with regard to the other titles. While the agencies have engaged in some collaboration and do participate in a cross-agency coordination group, enforcement could be greatly enhanced by better coordination. There is a particularly strong need for this in the referral process for Title II litigation. Title II involves eight cabinet-level agencies in complaint handling and enforcement; the Department of Justice, however, is responsible for litigation of Title II violations. The record of federal agency cooperation here is very weak; very few cases have been referred from the seven agencies to DOJ for litigation. As a result, the Department's record of Title II litigation is also weak. A fuller development of Title II case law cannot occur without increased referral of Title II violations from the agencies to the Department of Justice.

There are noticeable differences in the complaint handling processes across the different agencies. These differences can be attributed in part to the role that complaint handling has in an agency's overall mission. The EEOC, where complaint handling is a major function, has the most well-developed, well-documented system of procedures for processing ADA complaints, despite some earlier problems linked to inadequate resources. Other agencies, where complaint investigation is one activity in an organization with a wider focus, may not have a manual or a clearly articulated procedure. There should be a greater exchange of expertise about methods for investigating and documenting complaint processing among the agencies responsible for and experienced with complaint processing.

Agency resources are a key influence on the ability of an agency to effectively meet its enforcement responsibilities. The increases in the FY 1999 budget for ADA enforcement at the EEOC and DOJ were badly needed. Even with these increases, there remains a critical need for more resources to hire additional personnel, provide increased staff training, and support the development and maintenance of information management systems and other technology in the enforcement agencies. Truly effective and efficient enforcement cannot occur until these needs are met.

ADA enforcement agencies operate with varying administrative and organizational structures. This study of the several agencies suggests that attention to organizational structure and a strategic use of resources can significantly improve enforcement. Some of the gaps in enforcement that were observed were not solely a function of inadequate funding. Agencies need to identify their enforcement priorities so they can maximize their effectiveness within their budgetary resources, consistent with the recommendations contained in this report.

Finally, although this research project did not undertake to assess the nature or extent of negative and inaccurate media portrayals of ADA, the issue surfaced at several points in the examination of activities of the agencies. A persistent criticism was that the enforcement agencies were not vigorous enough in their reaction to the "bad press" on ADA. A persistent suggestion was for ADA enforcement agencies to be visible in their reaction to negative and incorrect media portrayals of ADA. More important, it was recommended that the enforcement agencies embark on a proactive campaign for ADA. The campaign would not require that the agencies "take sides" on issues where complainants and respondents may disagree. It would entail using the media to more clearly explain the requirements of ADA, its rationale, and the ways in which ADA protections are a benefit to us all.

Since the passage of ADA in 1990, the nation has made a respectable, though far from flawless, start toward eliminating discrimination on the basis of disability. Implementation of the overarching recommendations outlined in this chapter, and of the specific recommendations for each enforcement agency, can be considered mid-course corrections along the way to a truly effective enforcement of the Americans with Disabilities Act.

APPENDIX A: CONSOLIDATED LIST OF FINDINGS AND RECOMMENDATIONS

I. Findings and Recommendations Regarding the Department of Justice (Chapter 2)

Finding 1: Several Disability Rights Section (DRS) staff members interviewed for this report expressed concern about the number of administrative reviews affecting various stages of decision making about cases, the limited autonomy of line professional staff, and the separation of DRS from the main offices of the Civil Rights Division.

Examples of their concerns included the following:

- The delays that result, in part, from the multiple levels of review imposed by the administrative structure on decision making with respect to settlement and litigation;
- Managerial review of settlements and some correspondence that may not be necessary;
- The separation of the physical location of DRS from the main offices of the Civil Rights Division and the Department of Justice, and from most of the other sections in the Civil Rights Division, which hampers collaboration, integration, and understanding of disability issues across the sections of the Civil Rights Division.

Recommendation 1: The management, line attorneys, and other staff members of DRS should conduct a collaborative examination of DRS internal operations to determine how the concerns identified can be alleviated, where procedures can be streamlined, how staff members can be given the maximum autonomy feasible in carrying out their responsibilities to increase performance, and how DRS can ensure that it gets the maximum benefit of the input and abilities of its staff members, including those who have disabilities.

Recommendation 2: To the extent feasible, all sections of the Civil Rights Division should be housed in the same physical location in order to increase collaboration across sections and enable the communication of disability issues as part of a shared culture of civil rights. If the division cannot achieve a unified physical location of the sections, it should develop and activate mechanisms to foster cross-sectional interaction and cross-pollination, and to promote other sections' awareness and understanding of disability issues and sensitivities.

Finding 2: DOJ provides policy guidance primarily through its litigation and technical assistance activities.

- Guidance is provided by letters issued in response to specific inquiries. Although these express interpretation, they are not binding and do not constitute formal statements of departmental position having visibility and persuasive value to courts and lawyers in a manner similar to the EEOC's subregulatory enforcement guidance.

Finding 3: DOJ has been extremely slow in issuing regulations based on the Access Board's ADA accessibility guidelines; it has delayed inordinately in issuing regulatory accessibility standards for state and local government facilities and for children's facilities.

Recommendation 3: DOJ should establish and commit itself to meet a prompt timeline for issuing regulatory standards based upon Access Board guidelines; in particular, DOJ should promptly issue the long-delayed regulatory accessibility standards for state and local government facilities and for children's facilities.

Finding 4: Titles II and III of ADA assign DOJ authority for receiving and investigating complaints, but DOJ's responsibilities for enforcing Title III of ADA differ somewhat from the complaint-processing role of the EEOC under Title I. While DOJ ADA complaint-processing procedures continue to evolve and appear to be improving, there are still problems.

- DOJ refers or resolves nearly every Title II complaint but does not open for investigation most Title III complaints.
- Title III complaints are too often sent to mediation or returned to the complainant with a do-not-open letter indicating that DOJ will not investigate.
- While procedures used by DOJ for enforcing Title III are consistent with requirements of ADA, many people have the impression that filing with DOJ is similar to filing with the EEOC, that is, that all complaints will be investigated and "something" done with them. In fact, DOJ does not conduct its Title III enforcement in this manner, but is much more selective in the cases that it handles. The view that DOJ "does nothing" is a result of the mismatch of expectations and procedure.
- DOJ does not communicate quickly or regularly with complainants on the status of their complaints. Some complainants received no acknowledgment or other communication from DOJ for over a year following the submission of complaints until DOJ informed them that their complaints would not be investigated.

- DOJ can be slow in referring complaints under Title II to the appropriate designated agency.
- The length of time that elapses in the complaint handling process puts complainants at risk of losing their private right to sue because the statute of limitations may run out.

Recommendation 4: DOJ should continue to improve its complaint-processing procedures and performance.

Critical goals include speedier processing of complaints, better and more frequent communication with complainants, providing complainants with better information about the nature of the complaint processing process and DOJ responsibilities for the particular type of complaint at issue, and conforming with time frames of statutes of limitations for complainants to pursue private suits.

Recommendation 5: DOJ should make strong efforts to communicate to people with disabilities and the general public that it does not have the legal responsibility to and will not investigate every Title III complaint but rather will use complaints to identify pattern or practice issues or issues of general public importance.

Every Title III complainant should receive a letter within six weeks of filing, acknowledging receipt of the complaint, explaining DOJ's complaint-handling process, and clarifying that DOJ does not investigate every Title III complaint it receives.

Recommendation 6: DOJ should develop mechanisms that would significantly increase opportunities for the disability community to provide input regarding priority areas under Title II and Title III of ADA, including complaint-processing, compliance monitoring and technical assistance activities, and enforcement actions.

Finding 5: DOJ is sending increasing numbers of Title II and III complaints to mediation and has received additional funding to increase and modify mediation activities.

- Prior to July 1999, DOJ pursued mediation through a grant to an external provider and pro bono mediators. With new funds for mediation, DOJ has entered into a service contract with the outside organization and now pays mediators.

- DRS reports great satisfaction with how mediation is working and the outcomes it is achieving for complainants.
- To the extent that the contractor identifies problems or shortcomings in the current mediation process, the current contract calls for the contractor to propose solutions.
- Most mediations have involved Title III complaints. Of those referred, the parties engage in mediation in approximately 80 percent of the cases referred; in 63 percent of cases referred for mediation in which the parties agree to mediate, the cases are settled.
- DOJ does not involve itself in the mediation process as a party, through oversight of the legality of the outcome, or as a signatory to the agreement for enforcement purposes.
- Some contend that a problem with mediation is that it too frequently produces relief for the complainant without correcting the underlying illegal practices of the respondent.

Recommendation 7: As it expands its mediation program, DOJ should provide greater oversight of the mediation activities and of the settlements achieved through mediation, including the following:

- **DOJ should fund by contract a systematic study of how its ADA mediation is working, including an assessment of the extent to which the rights of persons with disabilities are being protected in the mediation process, of whether mediators are sufficiently skilled and trained, and of whether mediation agreements achieve results that are satisfactory to the parties, comply with the legal requirements of ADA, and are implemented. The study should include interviews with mediators to ascertain if they need additional training and should include a review of results of mediations completed to date, of mediation agreements that have resulted, and of implementation of terms agreed to.**
- **DOJ should adopt standards along the lines of the "ADA Mediation Guidelines" to govern mediations of ADA disputes.**
- **DOJ should provide or fund additional ADA training of mediators.**
- **DOJ should develop and fund a cadre of trained and paid mediation advocates to support complainants through mediation.**

Finding 6: Data collection and analysis in DRS is not organized well and has various deficiencies, including the following:

- **Considerable data are missing from the complaint database; the complaint database does not track details of case processing (including cases sent to mediation); and data are not entered on a timely basis.**
- **Only opened cases are entered in the database, so DRS does not know the total number of complaints received, even if not all are opened.**
- **The existing database is not useful for analysis of past performance, nor for DRS planning purposes, such as anticipating the flow of complaints, issues, etc.**
- **No publicly available database of Title II and III complaint-handling and litigation exists.**

Recommendation 8: DOJ should dramatically improve its collection, data-entry, and data-analysis processes with regard to the complaint database; improvements should include the entry of complete data; expanding the database to track the disposition and outcome of all complaints, not just those opened by DOJ; periodically analyzing the data to identify trends and problems with complaint handling; and making appropriate data on Title II and III complaint handling and outcomes available to the public in an accessible and usable format.

Finding 7: Under Title II, much of the complaint handling is to be performed by the appropriate cabinet agency from among the seven specifically designated in ADA regulations. While these agencies are to process the complaints, violations or pattern or practice issues are to be referred to DOJ for litigation. The referral process is not monitored well by DOJ and has resulted in few Title II cases in which the Federal Government is the plaintiff.

- DOJ is slow to refer complaints to the designated referral agencies.
- When DOJ sends complaints it receives to a designated agency, it often receives back a report on the disposition. However, DOJ does not always follow up on referred complaints. Moreover, it does not track the Title II complaints that are received directly by the agencies.
- DOJ referral agencies seldom refer cases to DOJ for litigation; the Department of Education has referred one case, Health and Human Services has referred one or two cases, and HUD and DOT have referred no Title II cases to DOJ for litigation.

Recommendation 9: DOJ should improve its handling of referrals of Title II complaints to the designated agencies in the following ways:

- **DOJ should refer complaints to the designated agencies more promptly.**
- **DOJ should increase its tracking and oversight of Title II complaints, both those it receives directly and refers, and those complaints that are filed directly at a designated agency.**

Finding 8: DOJ got a slow start in certifying state and local building codes; now that it has developed a methodology and gained familiarity with the task, however, it is certifying codes more quickly.

- DOJ is engaging in outreach to states and municipalities to encourage them to submit their codes for certification.

Finding 9: DOJ has made limited use of its statutory authority to perform compliance reviews of covered entities under Title III, nor has it made much use of its authority to conduct compliance reviews of entities covered by Title II.

Recommendation 10: DOJ should increase its compliance review activities and make creative use of accessibility surveys, testers, and other proactive techniques for identifying and remedying violations of ADA by covered entities. With the input of the disability community, DRS should identify priority areas for performing such reviews, taking into account the frequency, extent, and harmfulness of particular types of noncompliance, along with the degree to which particular types of noncompliance are less likely to be effectively addressed and remedied through individual complaints.

Finding 10: DOJ (DRS) litigates relatively few cases. DOJ participates as amicus in more cases than it initiates as a party, and more DOJ cases are settled than are litigated.

- DRS litigation involves initiating cases as the plaintiff, intervening in private litigation, or participating as amicus curiae. DRS has not initiated a lawsuit as plaintiff in a single Title II case.
- DRS litigation has focused on chain entities (fast food restaurants, hotels) and on large entities in entertainment and recreation (stadiums, racetracks); some have questioned whether these represent the most important issues that affect access in everyday life and participation in the community.
- Litigation activities have focused on ADA constitutionality questions and some important interpretive issues in the area of franchisors and funding and placement issues involving institutions; a broad vision for strategic litigation is not evident.

- Cases developed by DRS are more often settled than litigated. DRS should continue to use settlement where appropriate and should seek full remedies, including damages and civil penalties.
- DOJ's intervention in private litigation is sometimes too late to be helpful.

Finding 11: DOJ is cautious in its choices of ADA cases to litigate.

- DOJ cites a concern about creating bad case law as a reason for caution in pursuing ADA litigation.
- DRS has litigated in a variety of areas; many perceive this approach as avoiding hard issues and cases against big or powerful entities.
- Concern about negative media reaction, especially in the business press, appears to influence decisions about cases for litigation and positions in settlement negotiations.

Recommendation 11: DOJ should maintain the highest standards of vigorous ADA enforcement in deciding when and whether to settle cases.

Recommendation 12: DOJ should pursue a more aggressive program of litigation.

Recommendation 13: DRS should seek input from the disability community to obtain the views of people with disabilities regarding the prioritization of topics and issues for litigation.

Finding 12: DOJ has engaged in various public education and technical assistance efforts regarding ADA.

- Principal modes of technical assistance include ADA Information Hotline, an ADA Home Page, the development and dissemination of technical assistance documents, a speakers bureau, a traveling ADA display, a technical assistance grants program, and interagency coordination.
- An accessible ADA Web site contains information about how to contact ADA hotline, a list of ADA technical assistance documents, ADA regulations and information about newly proposed or issued regulations, information about building code certification, a complaint form for Title II or III complaints (to be printed and mailed, not e-mailed), and information on settlements, as well as all current downloadable TA publications, reports and information on settlement agreements, and links to TA letters and press releases and other federal agencies' ADA Web sites.

- Technical assistance publications include materials written by DOJ, publications produced under contract with other groups, and publications produced in coordination with other federal agencies. DOJ distributes these materials until they run out. Some materials from earlier contracts with outside groups are no longer available; others are available from the original source.

Recommendation 14: DOJ also should publish the following information on its ADA Web site:

- **Statistics on complaint processing (similar to the EEOC reporting on the nature of complaints and complainants and on complaint resolution)**
- **Summary data on the litigation docket**
- **Statistics about litigation and enforcement efforts of the Civil Rights Division as a whole (and each of the sections), directed to the various types of discrimination prohibited by federal civil rights laws.**
- **The DREDF ADA hotline number**

Finding 13: DOJ has not done enough in its public defense of ADA.

- DOJ has not engaged in an aggressive, positive media effort to combat negative and inaccurate portrayals of the requirements and intent of ADA.

Finding 14: DOJ has taken strong and appropriate policy positions on various issues in cases it has litigated.

Examples include

- Interpreting Title II broadly to cover all activities of state and local governments, such as prisons, arrest procedures, animal quarantine programs, zoning practices, and residential treatment and nursing facilities.
- Arguing that compensatory damages are available for violations of Title II.
- Advocating broad and inclusive interpretation of Title III coverage of public accommodations, to include, for example, the NCAA, PGA events, terms of insurance policies, cruise vessels (even those registered in a foreign country), and rental cars and shuttle bus services provided by rental car businesses.

- Defending the constitutionality of ADA as appropriate legislation under both the Fourteenth Amendment and the Commerce Clause of the Constitution.
- Challenging unnecessary inquiries by licensing authorities into an applicant's or licensee's disability in the context of professional licenses, including law and medical.
- Interpreting the requirement of making reasonable modifications in policies, practices, and procedures of both state and local governments and places of public accommodations broadly to apply in a wide variety of settings, including the use of driver's licenses for identification purposes, the LSAT, and child care centers.
- Contending that the Title III new construction accessibility requirement covers architects, contractors, and franchisors.

Finding 15: DOJ has made almost no use of its authority to issue additional regulations and subregulatory guidance under ADA.

Recommendation 15: DOJ should regularly issue subregulatory guidances and, as necessary, additional regulations to promote its policy stances, facilitate compliance, and guide the courts and other federal agencies. Among other matters, DOJ should

- **Underscore the application of Titles II and III of ADA to Web sites engaged in commerce, as part of its policy-making and enforcement responsibilities.**
- **Issue policy guidance to clarify that information kiosks and other information transfer technologies must be accessible to people with disabilities, including people with visual impairments.**
- **Issue policy guidance to require clearly that entities covered by Titles II and III must procure equipment and technology with accessibility features, including specifically ATMs and gas pumps.**

Recommendation 16: DOJ/DRS should engage in strategic planning and evaluation, including consultation with the disability community, as the basis for developing a focused strategy for maximizing its impact on Title II and III enforcement.

Recommendation 17: DOJ should take a proactive leadership role with regard to implementing ADA requirement, recognized in the *Olmstead* decision, that treatment, training, habilitation, and other services provided for people with disabilities must be in the most integrated setting appropriate; in pursuit of this goal, DOJ should

- **Issue a subregulatory guidance interpreting the implications of the *Olmstead* ruling as requiring integrated settings in lieu of segregated institutions and nursing homes.**
- **Prepare and implement a strategic plan for challenging states' violation of ADA's mandate to provide services in the most integrated settings appropriate to the needs of persons with disabilities, including the pursuit of litigation against noncomplying facilities.**
- **Coordinate with and provide leadership to the Department of Health and Human Services and other federal agencies to ensure a unified federal policy requiring services to be provided in appropriate, integrated settings, and to obtain referrals to DOJ from other federal agencies of cases suitable for litigation.**

Recommendation 18: The seven other designated agencies (the Department of Agriculture, the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development, the Department of the Interior, the Department of Labor, and the Department of Transportation) should refer to the Department of Justice Title II cases suitable for litigation.

All of the designated agencies should make it a priority to refer appropriate Title II cases for litigation. The Department of Health and Human Services should make a particular effort to refer cases that involve enforcement of the integration requirement of Title II in its application to residential or treatment facilities for persons with disabilities.

Recommendation 19: DOJ should take a more proactive leadership role with regard to the application of ADA to discrimination in insurance; in pursuit of this goal, DOJ should

- **Issue a regulation or subregulatory guidance making it clear that unequal classification or treatment of individuals with disabilities with regard to insurance eligibility, premiums, or benefits not based upon bona fide actuarial data violates ADA.**
- **Establish and fund a project to conduct research regarding insurance and actuarial procedures to identify what actuarial data and medical standards insurance companies assert to justify differential treatment of individuals with various disabilities; to assess how accurate, timely, and relevant the asserted justifying data are; and to develop independent data and information, available to the public, to serve as a comparative yardstick.**

- **DOJ should initiate and intervene in more lawsuits challenging companies' use of actuarial data as in violation of ADA.**

Finding 16: A shortage of fiscal and personnel resources has played a role in many of the shortcomings of DOJ ADA enforcement.

Recommendation 20: Congress should approve President Clinton's request for an approximately 20 percent increase in the annual budget of the Civil Rights Division, and DOJ should apply this increase proportionately to increase resources devoted to ADA enforcement. With these additional funds, DRS should enhance its performance and intensify its efforts with regard to enforcement areas in which it has fallen short because of resource limitations.

II. Findings and Recommendations Regarding the Equal Employment Opportunity Commission (Chapter 3)

Finding 17: The EEOC issued its regulations for the enforcement of Title I in a timely fashion and with input from the public and has issued a number of enforcement guidances and related policy documents to clarify Title I requirements.

Finding 18: The EEOC has developed National and Local Enforcement Plans that articulate the agency's strategies for utilization of its resources, including, specifically, aspects of its ADA enforcement activities.

Finding 19: EEOC processing of ADA charges is similar to its processing of charges under Title VII (race, sex, national origin).

Finding 20: The EEOC has initiated a number of administrative measures, applied across all statutes of enforcement, to increase the speed of its charge processing, focus its enforcement strategically, and produce resolutions through mediation.

Finding 21: Decisions about litigation priorities have been made at EEOC headquarters in the Office of the General Counsel or by the EEOC commissioners. Currently, the commissioners are responsible for making decisions on whether or not the EEOC will litigate ADA cases; these decisions have predominantly favored cases having individual plaintiffs in lieu of class action suits.

Finding 22: The processes of investigating, developing, and selecting cases to recommend for litigation and the actual litigation of cases have been primarily the responsibility of the individual district offices of the EEOC, with little collaboration or communication between the district offices.

Finding 23: The EEOC promptly initiated ADA training of its staff and ADA consumers. It has continued to update staff training as ADA matures.

Finding 24: The EEOC has provided technical assistance in the form of training, speakers, and written materials to other federal agencies and to employers. It has reached members of the disability community to a lesser extent and has not targeted specific groups such as persons from diverse cultural backgrounds, rural residents, or youth with disabilities.

Finding 25: The EEOC has not taken a sufficiently active role in responding to negative and inaccurate media and other public comments about ADA.

Recommendation 21: The EEOC should ensure that local enforcement plans are fully consistent with the National Enforcement Plan and the priorities it establishes.

Recommendation 22: The EEOC should do a better job of explaining to the public and to complainants the FEPA role in charge processing.

Recommendation 23: The EEOC should offer more support, oversight, and training to the staff of the Fair Employment Practices Agencies where ADA enforcement is performed under contract.

Recommendation 24: As the EEOC continues to expand its use of alternate dispute resolution, it should engage in a careful evaluation of how mediation is working and should adopt standards along the lines of the "ADA Mediation Guidelines" to govern mediations of ADA disputes.

Recommendation 25: The EEOC should develop a greater research and evaluation capacity, either in-house or through research contracting, as a means of providing information useful to policy development, litigation, and charge processing.

Recommendation 26: The EEOC should develop a stronger collaboration with the OFCCP that might involve sharing information from compliance reviews or other strategies for proactive compliance or for pattern and practice enforcement.

Recommendation 27: The EEOC should litigate more class action suits in appropriate circumstances for the enforcement of ADA.

Recommendation 28: The EEOC should continue and enhance its initiatives to attain a team approach on appropriate categories of ADA cases; teams of investigators and attorneys with particular expertise should be assembled across field offices and EEOC headquarters to pool resources and knowledge by conducting cross-office and cross-cutting investigations and litigation.

Recommendation 29: The EEOC should follow up ADA Supreme Court decisions with guidance and training for its field staff and for stakeholders on what the decisions mean for the enforcement of ADA.

Recommendation 30: The EEOC should initiate another round of consumer training about Title I to update the information of persons who may have been trained at an earlier point and to increase the cadre of persons who can themselves disseminate the training.

Recommendation 31: The EEOC should work to improve the understanding of disability issues and of ADA through increased training of the federal judiciary.

Recommendation 32: The EEOC should engage in increased outreach to the disability community. This outreach should involve a special effort to reach persons from diverse cultural backgrounds, rural residents, and youth with disabilities who are ready to move into employment.

Recommendation 33: The EEOC should devote greater attention and more resources to actively explaining ADA to the public in a positive manner.

Finding 26: The EEOC has taken strong, timely, and appropriate policy positions on various issues.

Examples include the following:

- Providing in the interpretive guidance for its Title I regulation that whether an impairment exists or substantially limits a major life activity should be determined without regard to mitigating measures such as medicines or assistive or prosthetic devices.
- Including, in the guidance memorandum on the definition of disability, as an example included within the "regarded as" prong of the definition of disability, a person with genetic predisposition to disease or disability.
- Issuing its groundbreaking and helpful Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities.
- Multifaceted efforts, including enforcement guidance and litigation, related to the issue of judicial estoppel.
- Taking, with only a few exceptions, sound policy positions supported by cogent analysis in its litigation activities.

Finding 27: The accessible, user-friendly style of the EEOC's enforcement guidances, with numerous concrete examples, provides an excellent model for all ADA guidance documents.

Recommendation 34: The other ADA enforcement agencies should seek to employ the readable, example-filled, accessible style of the EEOC's enforcement guidances.

Finding 28: The EEOC's performance of its policy leadership role regarding the enforcement of Title I of ADA has fallen short in a number of instances.

Recommendation 35: The EEOC should take a dynamic leadership role in ensuring the vigorous, full, and timely implementation of Title I requirements in complete fulfillment of the spirit and language of ADA and should adopt proactive positions that will further to the greatest possible extent the elimination of discrimination prohibited by ADA and the achievement for American workers and job-seekers with disabilities of the "equality of opportunity, full participation, independent living, and economic self-sufficiency" that Congress declared was ADA's purpose.

The EEOC should review its current policy positions and revise those that are not consistent with ADA's general purposes and the specific language and spirit of Title I's provisions. It should also engage in strategic planning to identify and "get ahead of the curve" on current and upcoming issues. It should not create or maintain any restrictions on ADA protection or on the rights afforded employees or job applicants that are not imposed by the statute itself.

Finding 29: The EEOC has repeatedly taken unnecessarily restrictive positions regarding the definition of "disability" and has erected obstructions that have impeded persons who seek to claim the protection of ADA.

The EEOC developed class-of-jobs-or-broad-range-of-jobs and single-particular-job-is-not-sufficient criteria not found in the statutory language of ADA, and remained silent when some courts started applying these criteria under the second and third prongs of the definition in addition to the first. While the EEOC made some efforts to ameliorate the harshness of its stance, it never corrected the central defect, that its criteria require complainants to prove what was in the mind of an employer—an onerous evidentiary burden. The EEOC's confined, technical approach to the definition of disability helped to create a judicial climate that eventually culminated in the decisions of the Supreme Court in the *Sutton*, *Murphy*, and *Kirkingburg* cases restrictively construing the definition.

The EEOC also imposed a duration limitation on ADA Title I protection that Congress had not seen fit to establish, and that neither the Department of Transportation nor the Department of Justice found necessary.

Recommendation 36: The EEOC should reorient its policy positions on the interpretation of the definition of disability and take clear and explicit actions to mitigate the impact of its previous restrictive positions and to promote, to the maximum extent possible, an inclusive interpretation of the scope of ADA protection to extend to all persons whom an employer disadvantages because they have a physical or mental impairment. At a minimum, the EEOC should

- **Issue subregulatory guidance clarifying that the third prong of the definition of individual with a disability includes any American who suffers discrimination on the basis of physical or mental impairment, even if that discrimination occurs on only one occasion in connection with one particular job with a particular employer, and explaining that the portions of the *Sutton*, *Murphy*, and *Kirkingburg* decisions interpreting the third prong of the definition represented an uninformed misapplication of first prong analysis to the third prong.**
- **Issue subregulatory guidance explaining the *Sutton*, *Murphy*, and *Kirkingburg* decisions and seeking to confine the impact of these rulings to their particular factual contexts.**
- **Pursue in litigation and in policy activities a proactive and concerted strategy of distinguishing the *Sutton*, *Murphy*, and *Kirkingburg* rulings as much as possible from other factual situations, with the goal of confining the impact of these rulings to their peculiar facts.**
- **Issue subregulatory guidance elaborating on the *Bragdon v. Abbott* decision and stressing its broad, nontechnical interpretation of substantial limitations with regard to major life activities other than working.**
- **Issue, as part of its responsibility to review the Title I regulation on the 10-year anniversary of ADA, a supplemental Title I regulation to (1) remove the duration limitation that its original regulation inserted as a standard in the determination of substantial limitation, and make it clear that a condition that an employer treats as substantial satisfies the definition no matter how**

temporary it may prove to be; and (2) promote an inclusive interpretation of the definition of disability and, in particular, the third prong of the definition.

Finding 30: The EEOC added a risk-of-harm-to-self component to the "direct threat" defense; Congress had specifically limited the defense to risks to "others."

Recommendation 37: The EEOC should issue, as part of its responsibility to review the Title I regulation on the 10-year anniversary of ADA, a supplemental Title I regulation to remove the risk-of-harm-to-self component from the direct threat defense, with interpretive guidance to explain why such a component is problematic and generally unnecessary.

Finding 31: The EEOC has largely remained silent on whether employers are required to provide reasonable accommodations for workers who satisfy the third prong of the definition of disability, that is, they are regarded by the employer as having a substantially limiting impairment.

Recommendation 38: The EEOC should clearly and forcefully declare that individuals who satisfy any of the three prongs of the "individual with a disability" definition are entitled to reasonable accommodations.

Finding 32: The EEOC's interim enforcement guidance on Disability-Based Distinctions in Employer-Provided Health Insurance presents an analysis that is convoluted and confusing, particularly as to who has to prove what, and does not make it clear that a health insurance distinction that disadvantages individuals with a particular disability or class of disabilities is discriminatory unless it is based on sound and legitimate actuarial data.

Recommendation 39: The EEOC should issue enforcement guidance that takes a clear position that any disadvantageous, differential treatment of individuals based on disability with regard to any type of insurance benefit that is not supported by sound, current, and legitimate actuarial data is prohibited by ADA.

This principle should be applicable to life insurance, accident insurance, disability insurance, liability insurance, health insurance, and other types of insurance. It should apply to differences in insurance programs' treatment of physical conditions and mental conditions, as well as to other differences based on disability.

Finding 33: The EEOC has not sufficiently addressed the issue of medical standards employed to make insurance determinations, nor has it examined the actuarial evidence insurance companies use to support such standards.

Recommendation 40: The EEOC should initiate a project to determine what medical standards are being applied by insurance companies; identify what actuarial data and information the medical standards insurance companies assert to justify the standards; assess how accurate, timely, and relevant the asserted justifying data are; and develop independent data and information to serve as a comparative yardstick.

Finding 34: Not enough is known about the medical standards and data employers rely on in making hiring, rehiring and return-to-work decisions.

Recommendation 41: The EEOC should initiate a project to determine what medical standards are being applied by employers in making hiring, rehiring, and return-to-work decisions, and to assess the reliability and relevance of such standards.

Finding 35: The EEOC has taken a compromising position that labor unions should be required to negotiate variances to protect workers' ADA rights instead of a principled legal position that ADA rights are not subject to limitation by the terms of collective bargaining agreements.

Recommendation 42: The EEOC should take a clear position that the rights and procedures guaranteed to applicants and workers under ADA are not subject to elimination or limitation by the terms of collective bargaining agreements.

Finding 36: The EEOC has shown that subregulatory guidance can be used very effectively to promote the implementation of Title I requirements; much more use of such guidance is needed.

Recommendation 43: The EEOC should make considerably more use of subregulatory guidance on a proactive basis; it should regularly identify issues and areas upon which additional direction and information are needed, and then should issue technical assistance materials or, as appropriate, subregulatory guidance providing such direction and information.

Additional guidance or technical assistance materials are needed to: (1) address particular areas of application of the reasonable accommodation requirement, such as technological accommodations, accommodations regarding transportation and parking, and additional clarification regarding working at home; (2) react to significant developments in the courts or elsewhere; (3) provide needed information and advice concerning particular categories of disabilities; and (4) provide additional direction regarding barrier removal and accommodations for people with sensory impairments, particularly impaired hearing and vision, including instruction to employers about designing universally accessible technologies. The EEOC may be able to adequately address some such issues through technical assistance materials and may not need to issue a guidance. The Commission should, however, systematically identify the various areas in which more direction and information are needed and then take timely action, by issuing guidances or producing technical assistance materials, to address the needs.

Finding 37: The EEOC has not engaged in any proactive strategies to address discrimination in the hiring process, a problem that charge processing does not address well. There is a critical need for assistance for employers in identifying and hiring qualified applicants with disabilities; employment rates of people with disabilities continue to be dismal.

Recommendation 44: The EEOC should place a priority on addressing problems faced by potential workers with disabilities in entering the workforce and securing appropriate jobs and should provide employers with guidance on how to eliminate barriers to people with disabilities in the application and hiring processes.

Recommendation 45: As the EEOC considers future amendments to its National Enforcement Plan, it should place a priority on facilitating the filing and handling of charges by individuals with particular categories of disabilities for whom EEOC litigation is occurring at a rate substantially under that expected in relation to their proportion of the population.

Finding 38: A shortage of fiscal and personnel resources has played a role in many of the shortcomings of EEOC ADA enforcement.

Finding 39: Despite substantially increased EEOC responsibilities associated with ADA enforcement beginning in 1992, the EEOC did not see an addition to its budget in real dollars until fiscal year 1999; even with recent budget increases, the EEOC's budget is still not sufficient to support a full array of strong and comprehensive ADA enforcement activities.

Recommendation 46: Congress should approve President Clinton's request for a 14 percent increase in the annual budget of the EEOC, and the EEOC should apply this increase proportionately to increase resources devoted to ADA enforcement. In conjunction with this funding increase, Congress should attach conditions on how the

increased resources shall be used, including placing a priority on the following ADA enforcement activities:

- **investigating and processing additional charges**
- **increasing ADA training**
- **expanding and improving technical assistance**
- **updating and maintaining the CDS database**
- **overseeing and evaluating mediation efforts**
- **making more culturally competent training and public education materials available, and**
- **pursuing more strategic litigation, including class action suits.**

III. Findings and Recommendations Regarding the Department of Transportation (Chapter 4)

A. Regarding the Federal Transit Administration (FTA)

Finding 40: FTAOCR, under its current leadership, has greatly increased the efficiency and procedural consistency of complaint processing. More public outreach efforts have also been instituted.

Finding 41: FTA complaint processing is still flawed in many areas. Understaffing, underfunding, and restrictions on the use of oversight funding for investigation of complaints have contributed to the problems cited below:

- **Complaint files are closed without monitoring that corrective action has been taken and often do not include a report of investigation with findings of fact, legal analysis, or indication of the applicable sections of the law.**
- **Numerous complaints must be filed on ADA complementary paratransit capacity constraints to cause an investigation and finding of noncompliance.**
- **Investigation never involves a site visit or consultation with persons or organizations other than the transit agency against which complaints have been filed. While FTAOCR receives funds for assessments, it receives no funds for complaint investigation.**
- **FTA resolutions tend toward (1) the narrowest possible legal interpretation of the DOT ADA regulation; (2) considering the problem in isolation rather**

than looking at the situation systemically; (3) taking the transit agency at its word rather than conducting an investigation; and (4) interacting very little with the complainant and failing to consult with the disability community.

- **FTAOCR has been given no additional FTEs since responsibility for the enforcement of ADA transportation provisions was delegated in 1996.**

Recommendation 47: Congress should adequately fund ADA enforcement activities to ensure the staff and other resources necessary for thorough follow-up on complaint handling, evidence of systemic violations derived from complaint data, and for conducting compliance reviews. Administrative restrictions on the use of oversight funds for complaint investigation should be removed.

Recommendation 48: Each complaint file should include a Report of Investigation with findings of fact, applicable sections of law, issues, and legal analysis. No complaint requiring corrective action should be closed without verification that the corrective action is taken, and this verification should be included in the complaint file.

Past complaints, closed without follow-up monitoring, should be reopened to verify whether corrective action agreed to by the transit authority was actually taken.

Recommendation 49: FTA should continue to improve its methods for tracking complaints in a manner that allows the analysis of patterns of practice in particular transit agencies as well as across the country as a whole.

Finding 42: Compliance reviews are seldom performed.

Recommendation 50: The tool of compliance reviews should be used for ADA fixed route and complementary paratransit situations where there appear to be significant ADA compliance problems.

Recommendation 51: Except in rare circumstances, FTA investigations should probe beyond the self-reporting of the transit agency. Investigations conducted as part of compliance reviews should involve more interaction with the disability community, particularly in large systemwide investigations.

FTA should conduct some site visits and spot checks. These activities should be funded adequately. Examples of when the disability community should be consulted include determination of whether compliance review milestones are reached or whether system-wide corrective actions have been implemented. Investigations should never be closed without follow-up on problems noted by the disability community.

Finding 43: No matter how significant or egregious noncompliance is, FTA has not imposed the kind of rigorous enforcement measures that would ensure that transit agencies correct ADA violations.

Recommendation 52: FTA enforcement should involve more substantial consequences for transit agencies that violate ADA. FTA should develop objective criteria defining degrees or forms of noncompliance by transit agencies that will trigger specific types of sanctions among a range of such sanctions of varying degrees of severity, including significant sanctions for transit agencies with serious, ongoing compliance problems.

Referral to the Department of Justice for litigation and holding up federal funds, or a portion of them, until compliance is achieved are among the consequences FTA can use to secure compliance.

Recommendation 53: When FTA uses consultants to conduct investigations, it should select only individuals or organizations who are viewed as fair and impartial by all parties.

Finding 44: At the time research for this report was conducted, DOT had never referred any findings of discrimination resulting from an ADA complaint to the Department of Justice for litigation.

Recommendation 54: FTA should continue to identify appropriate cases of noncompliance to the Department of Justice and cooperate fully in developing ADA transportation cases for litigation.

Recommendation 55: FTA should issue subregulatory guidance requiring transit agencies to display notices prominently in all vehicles used by transit systems notifying riders, in a format that is culturally competent for their ridership, that discrimination complaints can be made to the transit systems and to FTA.

Notices should include the FTA address and phone number. Transit agencies should also be required to notify all people who complain to them about problems with accessible service that complaints can be made to FTA.

Finding 45: FTA conducted ADA complementary paratransit plan review and approval through the five-year implementation period of ADA paratransit between 1992 and 1997. FTA staff members perceive that their responsibility is to ensure that transit agencies are in compliance with the requirement to submit the written plans, not to monitor actual ADA complementary paratransit service or verify compliance.

Recommendation 56: FTA should require transit agencies to submit ADA plans that include detailed reports on progress toward compliance with ADA's fixed-route requirements, along with ADA complementary paratransit compliance. FTA should monitor agencies' performance of both fixed-route and ADA complementary paratransit compliance by conducting compliance reviews and making use of site visits and spot checks, instead of relying exclusively on self-certification.

Finding 46: FTA has established voluntary compliance agreements (VCAs) for key rail stations in rapid rail, light rail, and commuter rail systems that failed to meet the accessibility requirements by July 1993 and were not eligible for or did not receive time extensions for extraordinarily expensive structural modifications.

FTA has extended the earlier deadlines of the VCAs for 26 rail transit agencies that carry the majority of rail passengers in the United States despite a statutory deadline of 1993 for most of them, because so many were still out of compliance in 1998. Some transit agencies with no or few accessible stations took no action toward providing access and have been rewarded more than once with a VCA or additional time extension, further extending their compliance deadlines.

Recommendation 57: FTA should undertake more rigorous enforcement measures against several transit properties whose VCAs or time extensions have expired.

FTA should refer the cases to the Department of Justice for litigation or should hold up funding (or a portion of funding) until full compliance is achieved.

Recommendation 58: The survey instrument used in key station inspections should be comprehensive and should reflect all characteristics necessary for ADA compliance.
Finding 47: FTA has engaged in a considerable amount of technical assistance activity, but little of it is for riders or for people with disabilities.

Recommendation 59: FTA should make publications available for people with disabilities about their rights to transportation services at varying levels of complexity (brief summaries; longer, more technical documents; etc.). FTA should also provide clear notice to transit agencies that they are required to provide and post information for transit users about procedures for filing complaints regarding alleged ADA violations with the transit agencies themselves and with FTA and that such information shall be provided in culturally competent formats appropriate to their riderships.

Recommendation 60: FTA should conduct extensive public education activities in culturally competent formats about accessible transportation for the disability community and other rider constituencies.

Recommendation 61: FTA should index on its Web site the technical assistance letters written in response to transit agency questions, and make them readily available.

Recommendation 62: FTA should offer technical assistance to transit agencies in the area of advanced technologies to improve program efficiencies.

The assistance should support the procurement and development of computer systems with data analysis capabilities to generate more reliable data about service performance and systems' schedule adherence and for automatic scheduling, AVLs, and MDTs.

Finding 48: FTA personnel, generally speaking, identify the agency's constituency as transit agencies.

FTA expends considerable energy to ensure transit agencies' compliance with mandates, including ADA, but it appears to serve the primary goal of ensuring on-paper compliance.

Recommendation 63: DOT should reassign its ADA monitoring and enforcement responsibilities to an administrative unit whose mission and other responsibilities are consistent with vigorous fulfillment of ADA monitoring and enforcement duties and which is as independent as possible from FTA offices that carry out its programmatic transportation responsibilities. Ideally, ADA monitoring and enforcement responsibilities should be assigned to a DOT entity other than FTA.

Preferably, ADA monitoring and enforcement should be relocated outside FTA in the Office of the General Counsel of DOT. If ADA functions must remain within FTA, they should be in FTAOCR, FTA's Office of Chief Counsel, or in a new office dedicated to monitoring and enforcing ADA, rather than in FTATPM or any other office that primarily carries out FTA's programmatic transportation responsibilities.

Recommendation 64: All FTA staff members involved with any aspect of ADA monitoring, implementation, enforcement, or technical assistance (including staff from the Office of Civil Rights, the Office of the Chief Counsel, the Office of Program

Management, and any other relevant offices) should receive extensive training regarding the Department of Justice ADA regulation that covers public transit agencies funded by FTA.

Recommendation 65: FTA should use the authority it has to monitor and enforce ADA rigorously, including the following tools that are already available to FTA: stronger interpretation of ADA regulations, compliance reviews, working with DOT to require transit agencies to submit complete ADA plans annually, conducting spot-check investigations of ADA compliance, and consulting more closely with the disability community. In cases of significant noncompliance, FTA should impose meaningful sanctions, including referrals to DOJ for litigation and holding up federal funds or a portion of federal funds.

B. Regarding the United States Coast Guard

Recommendation 66: The Coast Guard should continue firm, active enforcement to achieve remedial action.

Recommendation 67: Staff members of the Coast Guard's Office of Civil Rights should continue its proactive stance in educating the states about ADA compliance issues.

C. Regarding the Federal Aviation Administration

Recommendation 68: The FAA should take whatever steps are necessary to ensure ADA compliance by airports and private concessionaires with regard to the applicability of ADA to private landlord-tenant leases; these steps should include prompt and vigorous enforcement of FAA Order 1400.9.

To the extent that any determinations of nondiscrimination have been based on previous misinterpretations, complaints should be reopened.

Recommendation 69: The FAA should conduct training on ADA and investigative procedures for FAAOCR staff members in area field offices.

Recommendation 70: Rather than conducting complaint investigations exclusively in the area field offices, the FAA headquarters office should take a more proactive role as partner and guide to area field offices in their complaint investigation activities by providing specific support on particular investigations.

The FAA should allocate adequate resources to implement a headquarters/field partnership approach to complaint investigation and resolution.

Recommendation 71: The FAA should work with the Office of the General Counsel at DOT to convene a summit on improving air travel for passengers with disabilities.

Key topics to be addressed at the summit include ADA enforcement in airports and Air Carrier Access Act enforcement for airlines.

D. Regarding the Federal Highway Administration

Recommendation 72: FHWA should shift most of its complaint-investigation activity to the headquarters offices.

FHWA should use its field offices for specific support on particular investigations but should not locate the entire investigation in the field office. FHWA should allocate sufficient resources to accomplish this reassignment of responsibilities.

Recommendation 73: DOT should provide education and training for the field offices to clarify that civil rights enforcement is a primary component of FHWA's overall mandate.

Recommendation 74: The Office of the Secretary of DOT, DOT's Office of the General Counsel, the FHWA administrator, FHWA's Office of Chief Counsel, and the field office administrators should take whatever actions are necessary to ensure that ADA and other civil rights issues are taken more seriously by the field offices.

Recommendation 75: FHWA should require that each complaint file include a Report of Investigation with findings of fact, applicable sections of law, issues, and legal analysis.

No complaint requiring corrective action should be closed without verification that the corrective action is taken, and this verification should be included in the complaint file. These steps should be taken immediately; it is not necessary to wait until formal investigation procedures are finalized. Past complaints that were closed without monitoring of corrective action should be reopened for documented verification of whether the remedial steps were taken.

Recommendation 76: FHWA should engage in rigorous enforcement with respect to curb ramp complaints, an extremely important issue that is central to the daily lives of many people with disabilities.

FHWA should use the adequate legal tools currently available under ADA. FHWA must convey clearly and uncategorically to the field offices that it is FHWA's responsibility to investigate complaints regarding enforcement of accessible parking.

E. Regarding the Federal Railroad Administration

Recommendation 77: FRA should conduct its own investigations rather than relying on Amtrak.

Each complaint file should include a Report of Investigation with findings of fact, applicable sections of law, issues, and legal analysis. No complaint that requires corrective action should be closed without verification that the corrective action is taken, and this verification should be included in the complaint file.

Recommendation 78: FRA should closely monitor the staffing needs for ADA complaint investigation and enforcement function.

Until recently, the FRAOCR staffing level was clearly and egregiously inadequate to handle this important work. FRAOCR should prepare an evaluation report to the FRA administrator in the summer of 2000 assessing the adequacy of staffing and other resources presently available for conducting an effective enforcement program.

Recommendation 79: FRA should provide appropriate staff training to personnel involved in ADA investigative and enforcement functions.

F. Regarding the Department of Transportation as a Whole

Recommendation 80: DOT should continue the trend begun by Secretary Slater in placing a higher priority on ADA and other civil rights enforcement. The modes should be proactive in allocating adequate resources, both in terms of staff and training, to their offices having civil rights enforcement responsibilities.

Recommendation 81: DOT should foster a closer relationship between the Departmental Office of Civil Rights and the offices of civil rights in the operating administrations.

Recommendation 82: DOT should make civil rights a higher priority by making civil rights experience an important qualification for a promotion to an upper-level job.

Recommendation 83: The Office of the Secretary of DOT should institute and institutionalize measures to promote increased priority, understanding, and implementation of transportation rights of passengers with disabilities. Such initiatives should address the entire administrative structure of DOT, to increase the efficacy of ADA enforcement efforts in the Office of the General Counsel, the office of the administrator of each mode, the office of the chief counsel of each mode, the offices of civil rights of each mode, and the field office managers, down to the front-line enforcement personnel in the field offices.

These measures should include increased monitoring of and accountability for performance of ADA enforcement responsibilities throughout the DOT chain of command. In particular, DOT should require that each of the various modes develop objective criteria defining degrees or forms of noncompliance by covered entities that will trigger specific types of sanctions among a range of such sanctions of varying degrees of severity.

Recommendation 84: DOT should inaugurate a dedicated office or other formalized program of providing technical assistance to the public about the availability of its ADA enforcement program.

DOT's Office of the General Counsel recognizes that not enough complaints are being filed to enable the civil rights structures to induce systemic change through the application of enforcement authority. The paucity of complaints is largely the result of a lack of familiarity by potential complainants of their rights and of DOT complaint mechanisms. Outreach should extend to users of all forms of public transportation, including all bus, ADA complementary paratransit, and rail users (including Amtrak); to persons seeking both regular and commercial driver's licenses; to people with disabilities using streets and sidewalks; to airport users with disabilities; and to passengers of commercial vessels and ports.

Recommendation 85: DOT should initiate agencywide training to improve investigation procedures.

Each complaint file should include a Report of Investigation with findings of fact, applicable sections of law, issues, and legal analysis. No complaint requiring corrective action should be closed without verification that the corrective action has been taken, and this verification should be included in the complaint file. These steps should be taken immediately; it is not necessary to wait until formal investigation procedures are finalized.

Past complaints that were closed without monitoring of corrective action should be reopened for verification of whether appropriate remedial steps were taken.

Recommendation 86: DOT should initiate additional substantive training on ADA for its staff.

Recommendation 87: DOT should ensure that the planned departmentwide database of complaints will allow an operating administration to quickly determine what ADA complaints have been filed in the past against a particular covered entity or to identify the complaints involving the same type of discrimination issue in a particular state, region, or throughout the country.

Recommendation 88: DOT, under the leadership of the Office of the Secretary, should engage in strategic planning and evaluation involving regular consultation with the disability community as the basis for developing a focused strategy for improving its performance and maximizing its impact in enforcing ADA.

IV. Findings and Recommendations Regarding the Federal Communications Commission (Chapter 5)

Recommendation 89: The FCC should adopt all the policy and practice suggestions of NAD, the Consumer Action Network (CAN), and the Council of Organizational Representatives on National Issues Concerning People Who Are Deaf or Hard of Hearing (COR), grounded as they are in years of information-gathering about and analysis of consumer needs and technological possibilities.

Finding 49: States include information about complaints in conjunction with their state plans, which are submitted to the FCC every five years. There is no central source of information about the effectiveness of the complaint process in the states.

Recommendation 90: Congress should fund a nationwide study of the way the various states are handling the statutory requirement of "functional equivalency."

Recommendation 91: The FCC should establish an advisory committee on disability issues, including telecommunications relay services (TRS) issues, to coordinate with consumers, industry and providers on state policy and practice issues, as well as new technologies.

Finding 50: A minority of the estimated 28 million people who are deaf or hard of hearing know about TRS. Outreach is done at the state level, with no federal coordination. Models do exist for increasing awareness and use of TRS.

Finding 51: The National Association of State Relay Administrators provides states with an opportunity to share information. There is no official forum including consumers, advocates, state relay staff, and providers to serve as a forum for discussion of such issues as best practices, state-level consumer involvement, public outreach, new technologies, or regional cooperation.

Recommendation 92: Congress should fund a TRS technical assistance clearinghouse to provide information to consumers and relay providers.

Recommendation 93: The FCC should amend the minimum standards to significantly increase the public information and outreach efforts required.

The purpose of the outreach should be to increase general public and specific population awareness of TRS (not to promote the products of the TRS provider, as has been reported by advocates about earlier efforts). Costs should be recoverable through the same funding mechanisms as exist for TRS itself. The standards should reflect successful state-level efforts.

V. Findings and Recommendations Regarding the Architectural and Transportation Barriers Compliance Board (Chapter 6)

Finding 52: The Access Board produces an impressive volume of work of high technical quality.

Finding 53: The Access Board is to be commended for its work to harmonize the Americans with Disabilities Act Accessibility Guidelines (ADAAG) changes with the model building code developed by the American National Standards Institute (ANSI). Consistency is important, because states adopt the model building codes.

Finding 54: The Access Board strives to represent all interest groups fairly and forcefully; individuals in and out of government describe the board's work as authoritative and unbiased, and, because of its good reputation, it is designated to develop guidelines and standards in new laws.

Finding 55: The twofold statutory process in which the Access Board develops guidelines and DOT and DOJ adopt them as standards presupposes effective cooperation and collaboration between the Access Board and DOT and DOJ; where such cooperation and collaboration is lacking, the standing, authority, and effectiveness of the Access Board are weakened.

Finding 56: Effective collaboration between DOJ and the Access Board has been inconsistent over time.

Recommendation 94: DOJ and DOT should step up efforts to work with the Access Board to coordinate policy positions before guidelines are issued and technical assistance materials are finalized.

Finding 57: The Access Board is taking a leadership role in developing Web site accessibility standards in conjunction with government and industry leaders.

Recommendation 95: DOJ and the Access Board should coordinate their efforts regarding World Wide Web accessibility.

Finding 58: Some rulemaking takes so long that private board members, whose terms are four years, do not stay on the board long enough to see the completion of their efforts.

Finding 59: The Access Board is required to assume new responsibilities without additional funding, as new laws establish new responsibilities for the development of technical standards and guidelines.

Recommendation 96: When new laws require the Access Board to develop guidelines or standards, Congress should allocate increased funds for the work.

VI. Findings and Recommendations Regarding Technical Assistance Materials and Technical Assistance Agencies (Chapter 8)

Finding 60: Technical assistance materials are not centrally located; rather, they are widely dispersed throughout many agencies and organizations.

Finding 61: A significant proportion of technical assistance titles are available in alternative formats.

Finding 62: A significant number of titles are available in full-text format on the Internet.

Finding 63: Relatively few materials on the subject of ADA and transportation have been created specifically for use by people with disabilities. Likewise, few titles have been produced to help people understand the requirements of Title IV and the relay service.

Finding 64: Some agencies are making a serious effort to provide basic information in languages other than English.

Finding 65: Overall, technical assistance programs provide significant amounts of *information and materials* to diverse audiences.

Finding 66: Agencies too often do not engage in coordination and legal review of new materials.

Finding 67: The enforcement agencies' efforts to evaluate the effectiveness of their technical assistance programs have been few and inadequate.

Finding 68: Trained and compensated advocacy assistance is needed to bridge the gap for many people with disabilities between problem solving through information dissemination and the alternatives of filing a complaint or litigating.

Finding 69: Those programs that have moved to Web-based technologies are increasing their contact with potential customers and are making it easier for information seekers to find what they need quickly.

Recommendation 97: Congress should fund an ADA and Section 504 technical assistance and information clearinghouse whose purpose is to collect and catalog the widely dispersed ADA and Section 504 resources, and coordinate distribution with the technical assistance agencies.

Recommendation 98: While significant progress has been made making technical assistance materials available in alternative formats, all federally funded materials should be readily available in alternative formats, and the Department of Justice should take appropriate steps to ensure that this occurs.

Recommendation 99: The Department of Justice should initiate a collaborative effort with ADA technical assistance agencies to make all compatible ADA materials available in full-text, audio, or video formats on the Internet.

Recommendation 100: The Department of Justice should convene a task force to determine how to structure, fund, and institute an ADA advocacy initiative that spans the gap for assistance to complainants between where technical assistance leaves off and litigation begins. Congress should provide the funding necessary to implement this initiative.

Recommendation 101: The FCC should significantly increase public information/outreach efforts to increase general public and specific population awareness of the relay service.

Recommendation 102: DOT should significantly increase its commitment to providing ADA transit-related materials and training targeted to people with disabilities in culturally competent formats.

Recommendation 103: Those programs not already doing so should evaluate the effectiveness of their ADA technical assistance to determine whether their work is having the desired outcomes and should redirect resources on the basis of the results.

Recommendation 104: Within the limits of their statutory authority, the technical assistance organizations should collectively develop a coordinated strategic plan for advancing the understanding and implementation of ADA in the future.

APPENDIX B: SUMMARY OF THE AMERICANS WITH DISABILITIES ACT OF 1990[1]

Definition of Disability

The Three Prongs of the Definition—42 USC §12102(2)

A person with a disability is defined as:

1. a person with a physical or mental impairment that substantially limits one or more major life activities; or
2. a person with a record of such a physical or mental impairment; or
3. a person who is regarded as having such an impairment.

A physical or mental impairment means:

1. any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or
2. any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Under the first prong of the definition, for an impairment to be a disability, it must substantially limit some form of major life activity, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.

Whether a person has a disability should be assessed without regard to the availability of mitigating measures. For example, a person who is significantly hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Persons with impairments that substantially limit a major life activity are considered persons with disabilities even if the effects of the impairment are controlled by medication.

The second prong of the definition includes someone with a record of a substantially limiting impairment. This includes, for example, individuals with a history of mental illness, heart disease, or cancer, who no longer have the disease but may be discriminated against because of their record of the impairment.

The third prong of the definition includes persons who meet any of the following three conditions:

1. Someone who has a physical or mental impairment that does not substantially limit major life activities but who is treated by an employer or other covered entity as if the impairment does constitute such a limitation.
2. Someone who has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment.
3. Someone who has no impairment but is treated by an employer or other covered entity as if they have a substantially limiting impairment.

0.1 Individuals Who Illegally Use Drugs—42 USC §§12210, 12212

ADA excludes a person who is currently illegally using drugs from the definition of disability, if the illegal use of drugs is the reason for the discrimination. Drug use is not considered illegal if the drug is taken under the supervision of a licensed health care professional.

ADA does protect individuals who have overcome addiction to illegal drugs. This includes an individual who:

- has successfully completed a supervised drug rehabilitation program and is no longer illegally using drugs, or has otherwise been rehabilitated successfully and is no longer illegally using drugs;
- is participating in a supervised drug rehabilitation program and is no longer illegally using drugs; or
- is erroneously regarded as being an illegal drug user but is not illegally using drugs.

3.1 Other Conditions Exempted from the Definition—42 USC §12211

ADA specifies certain conditions which are exempted from the definition of disability. Homosexuality and bisexuality are not considered disabilities, and therefore are not included in the definition of disability under ADA. Also, the definition specifically excludes a number of conditions even though some of them might otherwise be considered disabilities. They are transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs.

4. Employment (Title I)

4.1 Effective Dates and Which Employers Are Covered—42 USC §12111 & 29 CFR §1630.2

ADA covers all private employers (whether private for-profit or private nonprofit) who have 15 or more employees. ADA's employment provisions became effective on July 26, 1992, for employers with 25 or more employees. On July 26, 1994, the provisions apply to all employers with 15 or more employees. The term "employer" in ADA does not include either of the following:

- The United States or an Indian tribe.
- A bona fide private membership club (other than a labor organization) that is exempt from taxation under the Internal Revenue Code.

6.1 Qualified Individual with a Disability and Essential Functions—42 USC §§12111, 12112 & 29 CFR §§1630.2(m), 1630.2(n), 1630.4

ADA prohibits discrimination against any qualified individual with a disability, because of such individual's disability, in regard to job application procedures, the hiring and discharge of employees, employee compensation, advancement, job training, and any other terms, conditions, or privileges of employment. The term "qualified individual with a disability" means an individual with a disability who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

"Essential functions" means job tasks that are fundamental and not marginal. Since a qualified individual with a disability is one who can perform the essential functions of a job (with or without reasonable accommodation), employers may deny jobs to applicants with disabilities who cannot perform essential functions (even with a reasonable accommodation), but may not deny jobs to applicants with disabilities simply because they cannot perform marginal functions, if the inability to perform marginal functions is due to the disability.

6.2 Reasonable Accommodation and Undue Hardship—42 USC §12111(10) & 29 CFR §§1630.2(o), 1630.2(p), 1630.9

Employers must make reasonable accommodations to the known physical or mental limitations of a qualified applicant or employee with a disability, unless the employer can demonstrate that the accommodation would be an undue hardship.

The term "reasonable accommodation" means:

- modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
- modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
- modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities.

Undue hardship means an action requiring significant difficulty or expense; one that is unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the employment. In determining whether a particular accommodation would be an undue hardship, factors to be considered include:

- the nature and net cost of the accommodation needed, taking into account the availability of tax credits and deductions, and/or outside funding;

- the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources;
- the overall financial resources of the employer; the overall size of the business with respect to the number of its employees; the number, type, and location of its facilities;
- the type of operations of the employer, including the composition, structure, and functions of the workforce; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer; and
- the impact of the accommodation on the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

14.1 Qualification Standards—42 USC 12112(b)(6) & 29 CFR §§1630.10B.11

Employers may not use qualification standards that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities on the basis of disability unless the requirements can be shown by the employer to be job-related and consistent with business necessity. Job-related means they measure or evaluate a skill that is actually needed on the job. To be consistent with business necessity, they must relate back to an essential function of the job. For example, an employer can adopt the job requirement that an applicant must be able to lift fifty pounds if that ability is genuinely needed to perform the essential functions of the job. Even if a requirement is job-related and consistent with business necessity, if it screens out a person with a disability because of the disability, the employer must still consider whether a reasonable accommodation would enable the applicant with a disability to satisfy the requirement.

14.1.1 Direct Threat—42 USC §12113(b) & 29 CFR §§1630.3, 1630.15

An employer may require that an individual not pose a direct threat to the health and safety of himself or herself or other persons in the workplace. The term "direct threat" means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

The determination that an individual with a disability poses a safety risk (whether to self or others) must be made on a case-by-case basis and must be based on the individual's present ability to safely perform the essential functions of the job. The mere possibility of future incapacity cannot be the basis for deciding that the individual poses a threat. Any determination of risk must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining direct threat, factors to be considered include:

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur; and
- the imminence of the potential harm.

An employer is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk or a speculative or remote risk. The risk can only be considered a direct threat when it poses a significant risk of substantial harm. The employer must identify the specific behavior on the part of the individual with a disability that would pose the anticipated direct threat. This determination must be based on facts and on the behavior of the particular person with a disability, not merely on generalizations, misperceptions, ignorance, or irrational fears about a disability.

If an individual poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to the point where there is not a significant risk of substantial harm. The employer may refuse to hire the applicant or may discharge the employee only if no accommodation exists that would either eliminate or reduce the risk.

18.0.1 Illegal Use of Drugs and Use of Alcohol—42 USC §12114 & 29 CFR §1630.16

Employers may prohibit the illegal use of drugs or the use of alcohol by all employees, may require that employees not be under the influence of illegal drugs or alcohol in the workplace, may require that employees conform their behavior to the Drug Free Workplace Act, and may hold a drug user or alcoholic to the same qualifications, performance standards, and behavioral standards to which all employees are held, even if unsatisfactory performance or behavior is related to the individual's drug use or alcoholism.

18.0.2 Medical Examinations and Other Inquiries—42 USC §12112(c) & 29 CFR §§1630.13, 1630.14

ADA prohibits employers from making any inquiries as to the existence or nature of an applicant's disability prior to an offer of employment. An employer may make preemployment inquiries into the ability of applicants to perform job-related functions.

Applications

Employers may not make inquiries about disability on job application forms, but may ask questions to determine whether an applicant can perform specific job functions. An application may include an inquiry into whether the applicant can perform job tasks with or without reasonable accommodation.

An employer may also ask, on a job application, that individuals with disabilities who will require a reasonable accommodation in order to take an employment test so inform the employer within a reasonable time period prior to the administration of the test. However, these questions must be narrowly tailored and may only request the information actually needed by the employer to provide the reasonable accommodation for the test.

Tests

Employers may not use tests that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities on the basis of disability unless the tests can be shown by the employer to be job-related and consistent with business necessity—that is, unless they measure or evaluate a skill that is actually needed on the job. Even if a test is job-related and consistent with business necessity, if it screens out a person with a disability because of the disability, the employer must still consider whether a reasonable accommodation would permit the needed skill or ability to be measured by other means.

Together with the requirement to provide reasonable accommodation, this provision requires that employment tests be administered to eligible applicants or employees with disabilities that impair sensory, manual, or speaking skills in formats that do not require the use of the impaired skill unless the impaired skill is what is being measured. Where it is not possible to test an individual with a disability in an alternative format, an employer may be required, as a reasonable accommodation, to evaluate the skill or ability being tested through some other means, such as an interview, education, work experience, licenses or certification, or a job demonstration for a trial period.

This provision does not apply to employment tests that are actually intended to measure sensory, manual, or speaking skills.

Interviews

In an interview, employers may not ask questions specifically about an applicant's disability. However, employers may ask an applicant to describe how, with or without reasonable accommodation, the applicant will be able to perform job-related functions. If an employer could reasonably believe an applicant will need reasonable accommodation to perform job functions, because the disability is obvious or because the applicant has disclosed a disability, the employer may ask certain limited questions about accommodations: whether and what type of accommodations would be needed. But these questions about accommodations cannot be asked if the disability is irrelevant to the type of job in question.

Medical Examinations

Medical examinations may be conducted only after a job has been offered to the applicant, and only if medical examinations are given to all employees entering into a particular job classification. The offer of employment may be conditioned on the applicant successfully completing the medical examination. The results of medical examinations must be kept confidential, and information obtained during the examination, including the medical condition and history of the applicant, must be collected and maintained on separate forms and kept in files separate from general personnel information. The results must not be used to discriminate against individuals with disabilities.

This confidential information may be shared only with:

- supervisors and managers, who may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- first aid and safety personnel, who may be informed, when appropriate, if the disability might require emergency treatment or if any specific procedures are needed in the case of fire or other evacuations;
- government officials investigating compliance with ADA and other federal and state laws prohibiting discrimination on the basis of disability, who must be provided relevant information upon request;
- state workers' compensation offices or "second injury" funds, in accordance with state workers' compensation laws;
- insurance companies where the company requires a medical examination to provide health or life insurance for employees.

A test to determine the illegal use of drugs is not considered a medical examination, and may be given by an employer at any point in the application process, even before a conditional offer of employment has been made.

Postemployment

Once a hire is made, an employer cannot require a medical examination, make an inquiry as to whether the employee has a disability, or inquire as to the nature or severity of the disability, unless the examination or inquiry is job-related and consistent with business necessity. The following are examples of situations in which a medical inquiry can be made:

- where there is evidence of a job performance or safety problem,
- where an examination is required by another federal law,
- where examinations are needed to determine current fitness to perform a particular job.

26.0.1 Other Employment-Related Requirements

Contractual Arrangements—42 USC §12112(b)(2) & 29 CFR §1630.6

It is discrimination under ADA if an employer participates in a contractual or other arrangement or relationship with another organization or individual that has the effect of subjecting a qualified applicant or employee with a disability to discrimination.

Association—42 USC §12112(b)(4) & 29 CFR §1630.8

ADA prohibits discrimination against any individual because of the known disability of another individual with whom the first individual has a relationship or association.

Insurance—42 USC 12201 & 29 CFR §1630.15 & 29 CFR §1630.16

An employee with a disability is entitled to the same access to insurance coverage as is provided to all other employees. Employers may not refuse to hire an applicant because of a feared or actual increase in insurance costs caused by the applicant's or the applicant's dependent's disability.

Employers may not deny health insurance coverage to selected members of their workforce based on diagnosis or disability. It is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments. A limitation may be placed on reimbursements for a procedure or the types of drugs or procedures covered, for example, a limit on the number of x-rays or excluding experimental drugs from coverage, but that limitation must apply to the particular treatment or procedure, and coverage cannot be denied entirely to a person with a disability on the basis of disability alone.

ADA does not invalidate preexisting condition clauses included in insurance policies, so long as such clauses are not used as a subterfuge to evade the purposes of ADA.

ADA does not disrupt the current nature of insurance underwriting or the regulatory structure for self-insured employers or of the insurance industry. However, this cannot be used as a subterfuge to evade the protections of ADA. Moreover, an insurance plan may not refuse to insure, or refuse to continue to insure, or limit the coverage available, or charge a different rate to an individual with a disability solely because of the disability, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

26.1 Enforcement—42 USC §12117

Filing Administrative Complaints with the EEOC

Persons alleging they have been discriminated against should file a complaint with the Equal Employment Opportunity Commission (EEOC). A complaint filed with the EEOC must be filed within 180 days of the incident of discrimination and may be filed in person, by phone, or by mail. A complaint is also called a charge of discrimination, and an individual, group, or organization that files a charge of discrimination is known as a "charging party." If there is a state or local agency fair employment practices agency that enforces a law prohibiting the same alleged discriminatory practice, it is possible that charges may be filed with the EEOC up to 300 days after the alleged discriminatory incident.

It is unlawful for an employer to retaliate against someone who files a complaint of discrimination, participates in an investigation, or opposes discriminatory practices. Even if an individual has already filed a complaint of discrimination, he or she can file a new charge based on retaliation.

The EEOC will investigate the complaint. If the EEOC believes that discrimination has occurred, it will attempt to resolve the complaint through conciliation and obtain full relief for the charging party. If conciliation fails, the EEOC will file suit or issue a "right-to-sue" letter to the charging party. The EEOC also issues right-to-sue letters when the EEOC does not believe discrimination occurred. The charging party is not required to wait for the EEOC to finish processing the complaint. She or he may request a right-to-sue letter from the EEOC 180 days after the complaint was filed.

Lawsuits

A person alleging discrimination has 90 days to file suit in federal court after receiving a right-to-sue letter. If a suit is filed, the EEOC will ordinarily dismiss the original complaint.

Remedies that may be awarded by the court for violations of the employment requirements of ADA include hiring, reinstatement in a job, promotion, back pay, front pay, restored benefits, reasonable accommodation, attorney's fees, expert witness fees, and court costs. Organizations representing individuals with disabilities may bring lawsuits on their behalf.

Because of the passage of the Civil Rights Act of 1991, additional remedies are available in cases of intentional employment discrimination under ADA. Jury trials are available, and compensatory and punitive damages may be awarded. Compensatory damages are available for intentional discrimination, and punitive damages are also available if the employer's conduct was wanton, willful, or reckless. There is a cap on the sum of future compensatory damages plus punitive damages, but there is no cap on compensatory damages that have already been paid out-of-pocket. The sum of future compensatory plus punitive damages may total no more than:

- $50,000 for an employer with between 15 and 100 employees;
- $100,000 for an employer with between 101 and 200 employees;
- $200,000 for an employer with between 201 and 500 employees; and
- $300,000 for an employer with more than 500 employees.

Intentional discrimination does not include the failure to provide a reasonable accommodation if an employer made a good faith effort to provide one.

31. Public Accommodations (Title III)

Title III of ADA describes the prohibitions against discrimination by privately operated public accommodations, commercial facilities, and private entities offering certain examinations and courses. Except where otherwise specified below, these requirements went into effect on January 26, 1992.

31.1 What Entities Are Covered?—42 USC §12181(7) & 28 CFR §104

ADA prohibits discrimination by any public accommodation, which is defined as any private entity that owns, leases (or leases to), or operates a place of public accommodation. A place of public accommodation is a facility, operated by a private entity, whose operations fall within at least one of the following categories:

1. an inn, hotel, motel, or other place of lodging (except for owner-occupied establishments renting fewer than six rooms);
2. a restaurant, bar, or other establishment serving food or drink;
3. a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
4. an auditorium, convention center, lecture hall, union hall, or other place of public gathering;
5. a bakery, grocery store, clothing store, hardware store, shopping center, or other retail or wholesale sales or rental establishment;
6. a laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
7. a terminal, depot, or station used for public transportation (other than air travel);
8. a museum, library, gallery, or other place of public display or collection;
9. a park, zoo, amusement park, or other place of recreation;
10. a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
11. a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
12. a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

The provisions of Title III do not apply to private clubs, which are also exempted from coverage under Title II of the Civil Rights Act of 1964. Case law under the Civil Rights

Act of 1964 has considerably narrowed the scope of which private clubs are exempted from coverage. A country club with exclusive membership requirements is an example of the kind of private club that is exempt. Clubs that solicit the general public for membership, such as a health club, are generally not exempt.

Religious organizations or entities controlled by religious organizations are also exempt. As in the case of private clubs, this exemption parallels a similar one in the Civil Rights Act of 1964. But in contrast to the private club exemption, this exemption is intended to have a broad application. However, a public accommodation that is not itself a religious organization but which leases spaces from a religious organization is not exempt. The test is whether the facility in question is controlled by the religious organization.

Landlord and Tenant Responsibilities—28 CFR §36.201

Both the landlord who owns a building that includes a place of public accommodation and a tenant who owns or operates the place of public accommodation are considered public accommodations, and both are fully responsible for complying with ADA's requirements. Allocation of the financial responsibility for complying with ADA's requirements may be determined by the lease or other contract between them, but such an allocation is only effective as between the two parties, and both landlord and tenant remain fully liable for compliance with all provisions of ADA. One party may require the other to indemnify it against all losses caused by the other's failure to comply with its obligations under the lease, but again, such matters would be between the parties and would not affect their liability under ADA.

If an entity that is not a public accommodation leases space for a temporary period in a place of public accommodation, the entity becomes a public accommodation for the duration of the lease. For the entity to become a public accommodation through leasing, some form of payment must be exchanged.

12.1 General Requirements—42 USC §12182 & 28 CFR §36.202 (and other sections as cited below)

No Exclusion of People with Disabilities—42 USC §12182(b)(1)(A)

No individual may be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. It is discrimination:

- to subject an individual or class of individuals on the basis of disability, directly or through contractual arrangements, to a denial of the opportunity to participate in or benefit from a place of public accommodation;
- to afford such an opportunity that is not equal to that afforded other individuals; or
- to provide such an opportunity that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with an opportunity that is as effective as that provided to others.

No Discrimination Through Contract—28 CFR §36.202

A public accommodation that enters into a contract with another entity must ensure that the activity operated under contract is in compliance with ADA.

Integrated Settings—42 USC §§12182(b)(1), 12201(d) & 28 CFR §36.203

Goods and services must be provided to an individual with a disability in the most integrated setting appropriate to the needs of the individual, i.e., in a setting that enables individuals with disabilities to interact with nondisabled individuals to the fullest extent possible. Even if a place of public accommodation provides separate programs or activities specifically for people with disabilities, an individual with a disability cannot be denied the opportunity to participate in programs or activities that are not separate or different. Nothing in ADA may be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that the individual chooses not to accept.

Eligibility Criteria Cannot Screen Out People with Disabilities—42 USC §12182(b)(2)(A)(i) & 28 CFR §36.301

It is discrimination to apply eligibility criteria or standards that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities from fully and equally enjoying any goods and services, unless such criteria can be shown to be necessary for the provision of the goods and services. The wishes, tastes, or preferences of other customers may not be used to justify criteria that would exclude or segregate individuals with disabilities.

A place of public accommodation may impose legitimate safety requirements, even if they tend to screen out people with disabilities. However, these requirements must be based on actual risks and on facts about particular individuals, not on speculation, stereotypes, or generalizations about individuals with disabilities or on the basis of presumptions as to what a class of individuals with disabilities can or cannot do. Any safety standard must be applied to all clients or customers of the place of public accommodation, and inquiries about it must be limited to matters necessary to carrying out the specific standard.

Modification in Policies—42 USC §12182(b)(2)(A)(ii) & 28 CFR §36.302

Places of public accommodation must make reasonable modifications in policies, practices, and procedures when such modifications are necessary to afford goods and services to a person with a disability, unless the public accommodation can demonstrate that modifying the policy or practice would fundamentally alter the nature of the goods and services offered.

A public accommodation that does not allow pets must modify that rule for a person with a disability who uses a service animal. A service animal is any guide dog, signal dog, service dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including but not limited to guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items. ADA's intent is to provide broad access to service animals in all places of public accommodation, including movie theaters, restaurants, hotels, retail stores, hospitals, and nursing homes. In general, the public accommodation may not require the person with a disability to be separated from the service animal. However, Department of Justice regulations state that in rare circumstances, accommodation of service animals may not be required because a fundamental alteration would result in the nature of the goods or services offered, or the safe operation of the public accommodation would be jeopardized.

Association—42 USC §12182(b)(1)(E) & 28 CFR §36.205

It is discrimination to exclude or deny equal goods and services to an individual or entity because of the known disability of another individual with whom the individual or entity has a relationship or association. The term "entity" is included because, at times, organizations that provide services to, or are otherwise associated with, persons with disabilities are subjected to discrimination. The relationship or association need not be a family relationship; any kind of relationship will suffice.

Surcharges—28 CFR §36.301

A public accommodation may not impose a surcharge on an individual with a disability or a group of individuals with disabilities to cover the cost of measures taken to comply with ADA, such as modification of policies, provision of auxiliary aids and services, barrier removal, or alternative methods to barrier removal.

Insurance—42 USC 12201(c) & 28 CFR §36.212

ADA makes it illegal for a public accommodation to refuse to serve persons with disabilities or to serve them differently due to their disabilities because its insurance company conditions coverage or rates on the absence of individuals with disabilities.

Personal Devices and Services—28 CFR §36.306

A public accommodation is not required to provide its customers, clients, or participants with personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; or services of a personal nature, including eating, toileting, and dressing.

15.1 Auxiliary Aids and Services—42 USC §12182(b)(2)(A)(iii) & 28 CFR §36.303

It is discrimination to fail to provide an individual with a disability with an auxiliary aid or service, if one is necessary to avoid excluding or segregating the person or denying him or her goods or services. Auxiliary aids and services mean measures to ensure communication accessibility for persons with impaired vision, speech, or hearing. However, a public accommodation need not provide an auxiliary aid or service if doing so would fundamentally alter the nature of the service being provided or would be an undue burden.

Auxiliary aids and services include such provisions as:

- effective methods of making visually delivered materials available to individuals with visual impairments, including but not limited to qualified readers, taped texts, audio recordings, brailled materials, or large print materials;
- effective methods of making aurally delivered materials available to individuals with hearing impairments, including but not limited to qualified interpreters, note takers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed-caption decoders, open and closed captioning, telecommunication devices for deaf persons (TDDs), or videotext displays;
- effective methods of assisting persons with speech impairments, including TDDs, computer terminals, speech synthesizers, and communication boards;
- acquisition or modification of equipment or devices; and
- other similar services and actions.

What Constitutes an Undue Burden or Fundamental Alteration?

Undue burden means significant difficulty or expense. Determination of what will constitute an undue burden must be made on a case-by-case basis. In determining whether an action would result in an undue burden, factors to be considered include:

- the nature and cost of the action needed;
- the overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
- the geographic separateness, and the administrative or fiscal relationship of the site(s) in question, to any parent corporation or entity;
- if applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; or the number, type, and location of its facilities; and
- if applicable, the type of operation(s) of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

A fundamental alteration is a modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered.

If providing a particular auxiliary aid or service would be a fundamental alteration or an undue burden, the public accommodation must provide an alternative auxiliary aid or service that would not be such a burden, if one exists, which would ensure, to the maximum extent possible, that individuals with disabilities receive the goods and services offered by the public accommodation.

Other Auxiliary Aid and Service Requirements

The auxiliary aid requirement is a flexible one. In many cases, a variety of auxiliary aids could be used to facilitate communication. Any can be selected as long as the result is effective communication. The public accommodation is strongly encouraged to consult with the individual with a disability to ensure the choice of an auxiliary aid or service that will result in effective communication.

The Department of Justice regulations envision a wide range of communications involving such areas as health, legal matters, and finances, which would be sufficiently lengthy and complex to require a sign language interpreter for effective communication. In situations requiring an interpreter, the public accommodation must secure the services of a qualified interpreter, unless an undue burden would result. A qualified interpreter is defined as an interpreter who is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

Public accommodations that offer customers, clients, participants, or patients the opportunity to make telephone calls on more than an incidental convenience basis must make available a TDD. For example, hospitals and hotels are two kinds of public accommodations whose clients and customers have the use of a telephone as an important part of the services provided. Such facilities must make TDDs available. Hospitals and hotels should also provide a TDD at their front desk in order to take calls from patients or guests who use TDDs in their rooms to make inquiries, order room service, etc.

Hotels and other places of lodging that provide televisions in five or more guest rooms, and hospitals that provide televisions for patient use, must provide, upon request, a means for decoding captions for use by an individual with a hearing impairment.

25.1 Courses and Examinations for Licensing and Certifications—42 USC §12189 & 28 CFR §36.309

Any private entity offering examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, or professional or trade purposes, must offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

Examinations

Required modifications to an examination may include changes in the length of time permitted for completion and adaptation in the manner in which an examination is given. The private entity offering the examination must provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills, unless that private entity can demonstrate that providing the auxiliary aid or service would fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden. Examinations must be offered in facilities that are architecturally accessible, or alternative accessible arrangements must be made. Examinations for individuals with impairments must be offered at equally convenient locations, as often, and in as timely a manner as are other examinations.

Courses

Any private entity offering courses must make such modifications to the courses as are necessary to ensure that the place and manner in which the courses are given are accessible to individuals with disabilities. Required modifications may include changes in the length of time permitted for completion or adaptation of the manner in which the course is conducted or course materials are distributed. The private entity must provide appropriate auxiliary aids and services for persons with impaired sensory, manual, or speaking skills, unless the private entity can demonstrate that offering a particular auxiliary aid or service would fundamentally alter the course or would result in an undue burden. Courses must be given in facilities that are architecturally accessible to individuals with disabilities, or alternative accessible arrangements must be made. Alternative accessible arrangements may include, for example, giving a course in a different location or providing the course through videotape, cassettes, or prepared notes. Alternative arrangements must provide comparable conditions to those provided for nondisabled individuals.

25.2 Structural Access

Existing Facilities—42 USC §12182(b)(2)(A) (iv), (v) & 28 CFR §36.304

Discrimination includes a failure to remove architectural, communication, and transportation barriers in existing facilities and vehicles where such removal is readily achievable. The term readily achievable is defined as "easily accomplishable and able to be carried out without much difficulty or expense." The readily achievable standard is a flexible one, in the sense that what is required will depend greatly on many factors, particularly the resources of the public accommodation. For example, much more would generally be required of a large convention center than a small neighborhood food store.

In determining whether an action is readily achievable, factors to be considered include:

- the nature and cost of the action needed;
- the overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or other impact of the action upon the operation of the site;
- the geographic separateness and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- if applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
- if applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of its workforce.

A public accommodation generally would not be required to remove a barrier to physical access posed by a flight of steps, if removal would require extensive ramping or an elevator. Ramping a single step, however, will likely be readily achievable, and ramping several steps will in many circumstances also be readily achievable.

Where an entity can show that the removal of a barrier is not readily achievable, it must make goods and services available through alternative methods, if such methods are readily achievable.

New Construction—42 USC §12183 & 28 CFR §401

ADA's new construction provisions, as well as the provisions covering alterations, affect an even broader scope of facilities than public accommodations. All commercial facilities are covered. Commercial facilities include all potential places of employment. This means, in addition to the twelve categories of places of public accommodation, facilities like warehouses, factories, and private offices, which often are not public accommodations.

It is discrimination to fail to design and construct commercial facilities and places of public accommodation for first occupancy later than January 26, 1993, that are readily accessible to and usable by people with disabilities. Architects, contractors, developers, tenants, owners, and other entities may all be responsible for any failure to design and construct buildings in compliance with ADA. To be readily accessible to and usable by people with disabilities, the facility must comply with DOJ regulations and the ADA Accessibility Guidelines (ADAAG).

There is an exception for buildings that are fewer than three stories in height or have fewer than 3,000 square feet per story. In these buildings, elevators are not required. A "story" is that portion of a building included between the upper surface of a floor and the upper surface of the floor or roof next above, if it includes occupiable space. Occupiable space means space designed for human occupancy and equipped with one or more means of egress, light, and ventilation. Basements designed or intended for occupancy are considered stories. Mezzanines are not counted as stories, but are just levels within stories.

The elevator exception, however, is not available—that is, the building must have an elevator—if the building has one or more of the following:

1. a shopping center or mall,
2. the professional office of a health care provider, or
3. a transit terminal, depot, or station (including an airport passenger terminal).

Facilities That Are Altered—42 USC §12183 & 28 CFR §§36.402 B 405

Altered Areas Must Be Accessible

If a commercial facility or place of public accommodation is altered after January 26, 1992, in a manner that affects or could affect usability, it is discrimination to fail to make the alteration in such a manner that, to the maximum extent feasible, the altered portion of the facility is readily accessible to and usable by individuals with disabilities. For an altered area to be considered accessible, it must comply with the alterations provisions of the DOJ regulations and the ADA Accessibility Guidelines.

The phrase "to the maximum extent feasible" allows for the occasional case where the nature of an existing facility is such as to make it virtually impossible to renovate in an accessible manner. However, the alteration must still provide the maximum amount of accessibility that is not "technically infeasible." "Technically infeasible," as defined in the ADAAG, means that an alteration has little likelihood of being accomplished because existing structural conditions require removing or altering a load-bearing member that is an essential part of the structural frame; or because other existing physical or site constraints prohibit modification or addition of elements, spaces, or features that are in full and strict compliance with the minimum requirements and that are necessary to provide accessibility.

Requiring access only when alterations "affect usability" means that minor changes such as painting or papering walls, replacing ceiling tiles, or similar alterations that do not affect usability or access do not trigger the requirement that the altered area be made accessible. Changes to floors may or may not affect usability, depending on the nature of the change involved. Routine maintenance or sanding would not affect usability or accessibility, but laying new carpets in a manner that creates a spongy or uneven surface would affect accessibility for people with mobility or vision impairments. Other changes, such as totally replacing a floor or installing a brick or stone floor, may be so substantial an undertaking and so connected to usability and accessibility as to trigger the accessibility requirements. Usability is intended to be defined broadly to include renovations that affect the use of a facility and not simply changes that relate directly to access.

Path of Travel to Altered Area Also Required

When alterations are made in primary function areas of buildings, an accessible path of travel from outside the building to the altered area must be provided if doing so is not disproportionate in cost and scope to the overall alteration. A primary function area is an area where a major activity for which the facility was intended takes place. The term "path of travel" also includes the restrooms, telephones, and drinking fountains serving the altered area.

The disproportionality concept recognizes that, in some circumstances, achieving an accessible path of travel (including the restrooms, telephones, and drinking fountains serving the altered area) may be so costly in comparison to the alteration being undertaken as to make this requirement unreasonable. Under ADA, the cost of providing an accessible path of travel to the altered area is considered to be disproportionate to the overall alteration when the path of travel cost exceeds 20 percent of the cost of the alteration to the primary function area.

If providing the accessible path of travel will cost more than 20 percent of the cost of altering the primary function area, the public accommodation or commercial facility is only obliged to provide what would not be disproportionate; that is, they are only required to spend 20 percent of the cost of altering the primary function area. In such a case, the public accommodation or commercial facility must choose which accessible features to provide. Priority should be given to those elements that will provide the greatest access, in the following order:

1. an accessible entrance;
2. an accessible route to the altered area;
3. at least one accessible restroom for each sex or a single unisex restroom;
4. accessible telephones;
5. accessible drinking fountains; and
6. when possible, additional accessible features such as parking, storage, and alarms.

6.1 Certification of Equivalence of State and Local Access Codes—42 USC §12188(b)(1)(A)(ii) & 28 CFR §§36.601-.608

State and local governments may apply to have their building codes certified as meeting or exceeding the minimum requirements of ADA for accessibility and usability of facilities.

6.2 Enforcement—42 USC §12188 & 28 CFR §§36.501-.505

Lawsuits

Any person who believes she or he has been discriminated against on the basis of disability has a private right of action and the right to seek injunctive relief from a judge. Injunctive relief can include a court order to alter facilities to make them readily accessible to and usable by individuals with disabilities. Injunctive relief can also include requiring provision of an auxiliary aid or service, modification of a policy, removal of readily achievable barriers, or the provision of service by alternative methods. Attorneys' fees are also available. ADA does not allow a private individual bringing a lawsuit to receive general, compensatory damages, including damages for pain and suffering, or punitive damages.

Filing Complaints

Persons wishing to do so may file complaints with the Department of Justice, which will process administrative complaints and pursue selected cases, including the undertaking of periodic reviews of compliance of public accommodations and commercial facilities. The Department of Justice may bring an action in cases of a pattern or practice of discrimination or in suits of general public importance. In such cases, a judge can award the same type of injunctive relief available in private suits. The judge can also impose a civil penalty of not more than $50,000 for the first violation and not more than $100,000 for a subsequent violation, if the judge determines such penalties are necessary to vindicate the public interest. In addition, if the Department of Justice requests it, the judge can award general compensatory damages (including damages for pain and suffering) but not punitive damages.

7. State and Local Government (Title II)

Title II of ADA prohibits discrimination against persons with disabilities in all services, programs, and activities provided or made available by state or local governments. Unless otherwise specified, these requirements went into effect on January 26, 1992. Title II is divided into two subtitles. Subtitle A of Title II, which is explained here, covers the activities of state and local governments other than public transit. Subtitle B of Title II, which is discussed under Transportation, deals with the provision of publicly funded transit.

7.1 What Entities and Activities Are Covered?—42 USC §§12102(3), 12131(1) & 28 CFR §§35.102, 35.104, 35.134, 35.140

Title II of ADA covers public entities. The term "public entity" means any department, agency, special purpose district, or other instrumentality of a state or local government, as well as Amtrak and certain commuter rail agencies.

ADA covers every type of state or local government activity or program, including employment. State and local governments cannot discriminate against job applicants and employees with disabilities. Unlike private employers, who are only subject to ADA if they have 15 or more employees, all state and local governments are covered regardless of how many people they employ. State and local governments that are large enough to be covered by Title I of ADA in the same way as private employers (i.e., that have 15 or more employees) must comply with Title I of ADA. State and local governments that are not large enough to be covered by Title I of ADA in the same way as private employers (i.e., that have fewer than 15 employees) must comply with the Department of Justice regulations that implement Section 504 of the Rehabilitation Act (28 CFR part 41) for purposes of Title II. The requirements set forth in the two sets of regulations are, for the most part, identical.

7.2 Qualified Individual with a Disability—42 USC §12131(2) & 28 CFR §35.104

ADA prohibits discrimination by any state or local government against any qualified individual with a disability because of such individual's disability. "A qualified individual with a disability" is defined as an individual who, with or without reasonable modifications to rules, policies, and practices, the removal of architectural, communication or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a state or local government.

7.3 General Requirements—42 USC §12132 & 28 CFR §35.130

No Exclusion of People with Disabilities—28 CFR §§35.130(a), 35.130(b)(1)(I)

It is discrimination to refuse to allow a qualified person with a disability to participate in a service, program, or activity simply because the person has a disability.

No Discrimination Through Contract—28 CFR §35.102

If a state or local government enters into a contract or other agreement with a private entity to carry out an aid, benefit, or service of the state or local government, the state or local government must ensure that the activity operated under contract or other agreement is in compliance with Title II of ADA.

Integrated Settings—42 USC §12201(d) & 28 CFR §§35.130(b)(1)(iv), 35.130(b)(2), 35.130(c), 35.130(d), 35.130(e)

Integration is fundamental to ADA, because segregation relegates people with disabilities to second-class status. Therefore, it is a violation of ADA if a state or local government fails to provide programs and services in the most integrated setting appropriate to the needs of the individual, i.e., in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.

Under ADA, state and local governments can offer programs that are specifically designed for people with disabilities. However, even if state and local governments provide such programs, an individual with a disability cannot be denied the opportunity to participate in programs or activities that are not separate or different.

Nothing in ADA requires an individual to accept an accommodation, aid, service, opportunity, or benefit that the individual chooses not to accept.

Eligibility Criteria Cannot Screen Out People with Disabilities—28 CFR §35.130(b)(8)

It is discrimination for a state or local government to apply eligibility criteria or standards that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities from fully and equally enjoying any goods or services, unless such criteria can be shown to be necessary for the provision of goods and services.

State and local governments may impose legitimate safety requirements, even if they tend to screen out people with disabilities. However, these requirements must be based on actual risks and on facts about particular individuals, not on speculation, stereotypes, or generalizations about individuals with disabilities or on the basis of presumptions about what a class of individuals with disabilities can or cannot do. Any safety standard must be applied to all clients or participants, and inquiries about it must be limited to matters necessary to carrying out the specific standard.

Modification in Policies—28 CFR §35.130(b)(7)

State and local governments must make reasonable modifications in policies, practices and procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless the state or local government can demonstrate that modifying the policy or practice would fundamentally alter the nature of the activities and services offered.

Association—28 CFR §35.130(G)

It is discrimination for a state or local government to exclude or deny equal services, programs, or activities to an individual or entity because of the known disability of another individual with whom the individual or entity has a relationship or association.

Surcharges—28 CFR §35.130(F)

A state or local government may not impose a surcharge on an individual with a disability or a group of individuals with disabilities to cover the cost of measures taken to comply with ADA, such as the provision of auxiliary aids or program access.

Granting of Licenses and Certifications—28 CFR §35.130(b)(6)

A state or local government may not discriminate against a qualified individual with a disability, on the basis of disability, in the granting of licenses and certifications. A state or local government may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a state or local government establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability.

Personal Devices and Services—28 CFR §35.135

A state or local government is not required to provide individuals with disabilities with personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature, including eating, toileting, and dressing.

7.4 Program Access in Existing Facilities—28 CFR §§35.149, 35.150

Every qualified individual with a disability is entitled to access to the programs, activities, services, and benefits provided by a state or local government. In existing facilities, a state or local government is required to operate each program so that, when viewed it its entirety, the program is readily accessible to and usable by people with disabilities. If a program can be made accessible by some method other than providing architectural access, providing architectural access is not required. A state or local government does not have to provide program access where the government can show that to do so would result in a fundamental alteration of the program or undue financial or administrative burdens.

In deciding which methods to use to achieve program access, innovation and creativity are encouraged. The following are possible methods that may be used:

- redesign of equipment,

- reassignment to accessible buildings,
- use of aides and home visits,
- delivery of services at alternative accessible sites,
- use of accessible vehicles,
- alteration of existing facilities, and
- construction of new facilities.

Effective access must be provided, and priority is given to methods that ensure integration of people with disabilities into the same programs and activities as nondisabled persons, i.e., that enable individuals with disabilities to interact with nondisabled persons to the fullest extent possible.

A state or local government has the obligation to prove that providing program access would result in fundamental alteration or undue burdens. All resources available for use in the funding and operation of the service, program, or activity must be considered. The decision that fundamental alteration or undue burdens would result must be made by the head of the state or local government or his or her designee, but in any case, by a high-level official, no lower than a department head, having budgetary authority and responsibility for making spending decisions. The decision must be documented in a written statement, including the reasons for reaching the conclusion that fundamental alteration or undue burdens would result.

14.1 Other Structural Access Requirements

New Construction—28 CFR §35.151(a)

Any facility or part of a facility that is newly constructed by a state or local government must be designed and constructed so that it is readily accessible to and usable by people with disabilities. For a facility to be "readily accessible to and usable by people with disabilities," it must comply with the accessibility standards discussed below.

Facilities That Are Altered—28 CFR §35.151(b)

When alterations will affect the usability of a facility, the altered portion of the facility must, to the maximum extent feasible, be readily accessible to and usable by people with disabilities. For a facility to be "readily accessible to and usable by people with disabilities" means it must comply with the accessibility standards discussed below.

Curb Ramps—28 CFR §35.150(d)(2)

If a state or local government has authority over roads and sidewalks, it must provide physical access. One form of providing physical access is to provide curb ramps or other sloped areas at existing pedestrian walkways.

Accessibility Standards—28 CFR §35.151(c)

Two choices for technical standards may be used in new construction and alterations of state and local government buildings:

- the Uniform Federal Accessibility Standards (UFAS), or
- the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG).

A state or local government may comply with either standard. It is expected that after some period of time, the Department of Justice will adopt new standards for Title II from the Access Board; after that point, state and local governments will be required to comply with ADAAG.

16.1 Auxiliary Aids and Services—28 CFR §§35.104, 35.160(b), 35.164

State and local governments must furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity, unless it would result in a fundamental alteration of the program or an undue financial or administrative burden. Auxiliary aids and services mean measures to ensure communication accessibility for persons with impaired vision, speech, or hearing.

Auxiliary aids and services include:

- effective methods of making visually delivered materials available to individuals with visual impairments, including but not limited to qualified readers, taped texts, audio recordings, brailled materials, or large print materials;
- effective methods of making aurally delivered materials available to individuals with hearing impairments, including but not limited to qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed-caption decoders, open- and closed-captioning, telecommunications devices for deaf persons (TDDs), or videotext displays;
- acquisition or modification of equipment or devices; and
- other similar services and actions.

A state or local government must give persons with disabilities the opportunity to request the auxiliary aids and services of their choice. That choice must be given primary consideration—that is, the government must honor the choice unless it can demonstrate that another effective means of communication exists, or that use of the means chosen by the person with a disability is not required because it would result in a fundamental alteration or an undue burden.

Provision of Qualified Interpreters—28 CFR §35.104

A "qualified interpreter" is an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary.

Provision of telecommunication Devices for the Deaf—28 CFR §§35.161-.162

Communication by Telephone—28 CFR §35.161

When a state or local government communicates with the public by telephone, ADA requires that telecommunication devices for the deaf (TDDs) or equally effective telecommunication systems be used to communicate with people who have hearing or speech impairments. "Equally effective communication systems" may include the use of a telecommunications relay service such as that required by Title IV of ADA.

Telephone Emergency Services (9-1-1)—28 CFR §35.162

A state or local government is required to provide "direct access" for callers with hearing or speech impairments who use TDDs or computer modems to any telephone emergency services (often known as "9-1-1" services) available to callers without disabilities, including fire, police, ambulance services, emergency poison control information, etc.

Procedure for Claiming Fundamental Alteration or Undue Burdens—28 CFR §35.164

A state or local government has the obligation to prove that providing an auxiliary aid or service would result in fundamental alteration or undue burden. All resources available for use in the funding and operation of the service, program, or activity must be considered. The decision that fundamental alteration or undue burden would result must be made by the head of the state or local government or his or her designee, but in any case, by a high-level official, no lower than a department head, having budgetary authority and responsibility for making spending decisions. The decision must be documented in a written statement, including the reasons for reaching the conclusion that fundamental alteration or undue burden would result.

20.1 Self-Evaluation and Transition Plan

Self-Evaluation—28 CFR §35.105

All state and local governments must do a self-evaluation of their current services, programs, and activities, and review all their policies and practices, and the effects thereof, that do not or may not meet the requirements of ADA. To the extent that modification of any such services, policies, and practices is required, the state or local government must make the necessary modifications. The self-evaluation was to be completed by January 26, 1993.

Transition Plan—28 CFR §§35.150(c), 35.150(d)

A state or local government must complete a transition plan only if structural changes are needed to achieve program access and if the state or local government has 50 or more employees. A transition plan addresses the structural changes that must be made to state and local government facilities. The transition plan must identify physical obstacles that limit program access, describe in detail the methods that will be used to achieve program access, and set out the schedule for making structural changes that are needed. If the time period for the transition is more than one year, the schedule must identify the changes that will be made during each year. The plan must also identify the state or local government official who is responsible for implementing the plan. The deadline for developing a required transition plan was July 26, 1992. All structural changes that need to be made to provide program access were to be made by January 26, 1995.

20.2 Enforcement

Internal Grievance Procedures—28 CFR §35.107

All state and local governments with 50 or more employees must designate at least one employee to coordinate the government's effort to comply with ADA and must disseminate information about how to locate that employee. The designated employee(s) must investigate any complaints alleging that the state or local government has failed to meet the requirements of ADA. The state or local government must make the name, business address, and business telephone number of the designated employee(s) available to interested persons. Also, a state or local government with 50 or more employees must adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging failure to comply with ADA.

Filing Administrative Complaints with the Federal Government—28 CFR §§35.170-.174, 35.190

To enforce Title II, administrative complaints may be filed with the Federal Government alleging that a state or local government has not complied with ADA. Any administrative complaint must be filed within 180 days of an incident of discrimination.

A complaint (other than an employment complaint) may be filed with any of the following:

1. any federal agency that provides funding to the state or local government that is the subject of the complaint, or
2. any of the eight agencies designated by ADA regulations for state and local government enforcement, or
3. the Department of Justice.

An employment complaint may be filed with any of the following:

1. any federal agency that provides funding to the state or local government that is the subject of the complaint, or
2. any of the eight agencies designated by ADA for state and local government enforcement, or
3. the Equal Employment Opportunity Commission.

Designated agencies will investigate each complete complaint, attempt informal resolution, and, if resolution is not achieved, issue to the complainant and to the state or local government against which the complaint has been filed a letter of findings containing findings of fact, conclusions of law, and a description of a remedy for each violation found. If a designated agency's letter of findings finds noncompliance, it will notify the Department of Justice by forwarding a copy of the letter of findings and will initiate negotiations with the state or local government to secure compliance by voluntary means. If the designated agency is able to secure voluntary compliance, a voluntary compliance agreement will be executed in writing and signed by the parties. If a state or local government declines to enter into voluntary compliance negotiations or if negotiations are unsuccessful, the designated agency shall refer the matter to the Department of Justice with a recommendation for appropriate action. The Department of Justice may proceed to file a suit in federal district court.

Lawsuits

Lawsuits may be filed against state and local governments at any time, whether or not one has filed an administrative complaint. The remedies that are available in a lawsuit under Title II of ADA include court orders that a state or local government comply with ADA and attorneys' fees.

Until 1992, federal courts in various parts of the country came to different conclusions as to whether compensatory and punitive damages are available under Section 504. However, this issue may have been resolved by a Supreme Court decision in February 1992 called Franklin vs. Gwinnett County Public Schools, No. 90-918, which states that under a similar law, Title IX of the Education Amendments of 1972, which prohibits sex discrimination, courts may award damages. Therefore, it is very likely that money damage awards will be available under Title II of ADA.

4. Transportation (Titles II & III)

Public transportation means transportation by bus, rail, or any other conveyance (other than air travel) that provides the general public with general or special service on a regular and continuing basis.

4.1 Transportation Provided by Publicly Funded Entities—42 USC §§12141B12161

Newly Purchased Vehicles—49 CFR §§37.7, 37.9, 37.71

It is discrimination for a public entity to purchase or lease a new fixed-route bus or rail vehicle for which a solicitation was made after August 25, 1990, if the vehicle is not readily accessible to and usable by individuals with disabilities. The "readily accessible to and usable by" standard means that vehicles for which bids were closed on or after October 7, 1991, must comply with technical standards in the DOT regulations.

Used Vehicles and Remanufactured Vehicles—42 USC §12142(b) & 49 CFR §37.73; 42 USC §12142(c) & 49 CFR §37.75

If a public entity purchases or leases a used vehicle after August 25, 1990, the entity must make demonstrated good faith efforts to purchase or lease an accessible vehicle.

A remanufactured vehicle is a vehicle that has been structurally restored and has had new or rebuilt major components installed to extend its service life for at least five years. If a public entity remanufactures a vehicle or purchases a remanufactured vehicle so as to extend its useful life for five years or more, the vehicle must be accessible to the maximum extent feasible. This requirement went into effect starting August 25, 1990. "To the maximum extent feasible" means that access is not required if an engineering analysis indicates that specified accessibility features would have a significant adverse effect on the structural integrity of the vehicle.

Requirements Cannot Be Evaded Through Private Contracts—49 CFR §§37.23, 37.37

The ADA's transportation requirements may not be evaded by public transit agencies that choose to provide service by contracting with private companies rather than providing the service directly. A private entity that purchases or leases vehicles for use or in contemplation of use under contract or other arrangement with a public agency must acquire accessible vehicles in all situations in which the public agency itself would be required to do so. Also, the public agency must ensure that the percentage of accessible vehicles in the overall fleet (including those of the private entity) is not diminished as a result of the contract.

Providing Nondiscriminatory Service—42 USC §§12201-12212 & 49 CFR §§37.5, 37.161-.167, 37.173

Except as specified below, the requirements in this section apply to privately funded transit agencies as well as publicly funded ones.

No transit agency may deny any individual with a disability, on the basis of disability, the opportunity to use the transit agency's service if the individual is capable of using that service. Each transit agency must ensure that personnel are trained to proficiency.

Transit agencies must maintain in operative condition those features of facilities and vehicles necessary to make the facilities and vehicles accessible. These features include lifts, securement devices, elevators, signage, and systems to facilitate communications with persons with impaired vision or hearing. Accessibility features must be repaired promptly. When an accessibility feature is out of order, the transit agency must take reasonable steps to accommodate individuals with disabilities who would otherwise use the feature. Isolated or temporary interruptions in service or access due to maintenance or repairs are not considered discrimination, but a pattern of such interruptions in service or an overly long interruption in service could be considered discrimination.

There are additional maintenance requirements for publicly funded bus transit agencies. These agencies must establish a system of regular and frequent maintenance checks of lifts sufficient to determine if they are operative. The transit agency must ensure that vehicle operators report, by the most immediate means available, any failure of a lift to operate in service. When a lift is discovered to be inoperative, the transit agency must take the vehicle out of service before the beginning of the vehicle's next service day and ensure that the lift is repaired before the vehicle returns to service.

There is an exception to the requirement to remove a vehicle from service to repair it, for situations in which there is no spare vehicle to take the place of the vehicle to be removed, and taking the vehicle out of service would reduce the transportation service available to the general public. In such cases, the transit agency may keep the vehicle in service with an inoperable lift for no more than five days (if the transit agency serves an area of 50,000 or fewer population) or three days (if the transit agency serves an area of over 50,000 population) from the day on which the lift is discovered to be inoperative.

All common wheelchairs and their users must be transported in the transit agency's vehicles or other conveyances. Common wheelchairs are those wheelchairs that can fit on a lift that complies with the specifications in DOT's technical standards (that is, a 30-inch by 48-inch lift) and weighs no more than 600 pounds when occupied.

The transit agency is not required to permit wheelchairs to ride in places other than designated securement locations in the vehicle, where such locations exist. The transit agency may require that a wheelchair user permit his or her wheelchair to be secured and must use securement systems to ensure that the wheelchair remains in the securement area. But even if the securement system cannot accommodate a particular wheelchair, transportation cannot be denied to its user. Further, while systems to secure the wheelchair may be required, the passenger may not be required by the transit agency to use a seat belt unless all other passengers in the vehicle are similarly required to use seat belts. The transit agency may recommend but may not require that a wheelchair user transfer to a vehicle seat.

The transit agency must permit individuals with disabilities who do not use wheelchairs, including standees, to use a vehicle's lift or ramp to enter the vehicle.

The transit agency may not refuse to permit a passenger who uses a lift to board or disembark from a vehicle at any designated stop, unless the lift cannot be deployed at the stop, unless the lift will be damaged if it is deployed, or unless all passengers are precluded from using the stop due to temporary conditions at the stop that are not under the control of the transit agency.

On fixed-route systems, stops must be announced at transfer points with other fixed routes, other major intersections and destination points, and intervals along a route sufficient to permit individuals with visual impairments or other disabilities to be oriented to their location. Also, any requested stop must be announced.

Paratransit Is Required—42 USC §12143 & 49 CFR §37.121 B 155

ADA states that it is discrimination for a public agency that operates a fixed-route bus system, rapid rail system, or light rail system to fail to ensure that paratransit is provided to individuals with disabilities who cannot use the fixed-route system. The paratransit program was to begin to be implemented by January 26, 1992.

If the provision of paratransit would be an undue financial burden on the public transit agency, service is not required beyond the undue burden level, unless ordered by the Department of Transportation.

Paratransit Eligibility: Three Categories—42 USC §12143(c) & 49 CFR §37.123

First Eligibility Category—"Can't Navigate The System." The first category includes any individual with a disability who is unable, as the result of a physical or mental impairment (including a vision impairment) without the assistance of another individual (except the operator of a wheelchair lift or other boarding assistance device) to board, ride, or disembark from any vehicle on the system that is readily accessible to and usable by individuals with disabilities.

Second Eligibility Category—"Needs An Accessible Bus." The second category includes individuals with disabilities who can use buses that have wheelchair lifts or other boarding assistance devices when such persons want to travel on routes that are still inaccessible (not served by accessible buses).

Third Eligibility Category—"Specific Impairment-Related Condition." The third category includes any individual with a disability who has a specific impairment-related condition that prevents the individual from traveling to a boarding location or from a disembarking location.

At Least One Associate May Also Ride—At least one associate may ride with any recipient of paratransit services.

Paratransit Service Criteria—42 USC §§12143(c)(2)-(3) & 49 CFR §37.131

Service Criterion #1: Service Area. The transit agency must provide paratransit to origins and destinations within corridors that extend three-fourths of a mile on each side of each fixed route (that is, corridors that are 1.5 miles wide). At the endpoint of each route, the corridor must include an area with a .75 mile radius. Within the central portion of the urban area where the corridors around each route converge to form a solid mass (also known as the core service area), the transit agency must also provide paratransit service to small areas not inside any of the corridors but that are surrounded by corridors. Service must be provided from any point in any of the corridors to any point in the same corridor or in any other corridor.

Service Criterion #2: Response Time. The transit agency must schedule and provide paratransit service to any ADA paratransit-eligible person at any requested time on a particular day in response to a request for service made the previous day. The transit agency may negotiate pickup times with the individual, but may not require him or her to schedule a trip to begin more than an hour before or after the individual's desired departure time.

Service Criterion #3: Fares. Paratransit fares may not exceed twice the fare that would be paid by an individual paying full fare (not discounted fare) for a trip of similar length, at a similar time of day, on the transit agency's fixed-route service.

Service Criterion #4: No Trip Purpose Restrictions. Paratransit service may not impose restrictions or priorities based on trip purpose.

Service Criterion #5: Hours and Days of Service. Paratransit must be available throughout the same hours and days as the transit agency's fixed-route service.

Service Criterion #6: Capacity Constraints. The transit agency may not limit the availability of paratransit service to ADA paratransit eligible persons in any of the following ways:

1. Restrictions on the number of trips an individual will be provided;

2. Waiting lists for access to the service; or
3. Any operational pattern or practice that significantly limits the availability of service to ADA paratransit-eligible individuals, including but not limited to substantial numbers of significantly untimely pickups, substantial numbers of trip denials or missed trips, or substantial numbers of trips with excessive lengths. Operational problems attributable to causes beyond the control of the transit agency (such as weather or unanticipated traffic conditions) may not be a basis for determining that such a pattern or practice exists.

Communities Operating Demand Responsive Systems for the General Public—42 USC §12144 & 49 CFR §37.77

It is discrimination under ADA for a transit agency to purchase or lease a new vehicle after August 25, 1990, for demand responsive service that is not accessible, unless the transit agency can demonstrate that the system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to the level of service provided to the general public.

Rail Transit

ADA covers intercity, commuter, rapid, and light rail systems.

Intercity Rail (Amtrak)—42 USC §12162 & 49 CFR §37.91 & 49 CFR §37.55

ADA requires Amtrak, which operates intercity rail transit in the United States, to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities as soon as is practicable, but in no event later than July 26, 1995. Also, as soon as is practicable, but in no event later July 26, 1995, Amtrak must include, on each train with one or more single-level rail passenger coaches, a number of spaces to park and secure wheelchairs equal to not less than one-half the number of single-level rail passenger coaches on the train. The purpose of these spaces is to accommodate individuals who wish to remain in their wheelchairs while traveling on Amtrak. In addition, Amtrak must also include on each of these trains a number of spaces to fold and store wheelchairs equal to not less than one-half the number of single-level passenger coaches on the train. The purpose of these spaces is to accommodate persons who wish to transfer to coach seats from their wheelchairs. Further, by July 26, 2000, Amtrak must provide twice that number.

Existing intercity rail (Amtrak) stations must be made accessible as soon as practicable but in no event later than July 26, 2010. It is discrimination to build a new station for intercity rail use that is not readily accessible to and usable by individuals with disabilities.

Commuter, Rapid, and Light Rail—Existing and New Cars—42 USC §12162(b) & 42 USC §§12142(a), 12162(b)(2)(A) & 49 CFR §37.93 & 49 CFR §§37.79, 37.85

At least one car per train on light and rapid rail trains of at least two cars in length were to be accessible to individuals with disabilities by July 26, 1995. One-car trains are exempted. For commuter rail, one car per train was required to be accessible by July 26, 1995, regardless of the train's length.

It is discrimination under ADA to purchase or lease new passenger rail cars for use in commuter, rapid, and light rail transportation, for which solicitation was made after August 25, 1990, unless the cars are readily accessible to and usable by individuals with disabilities.

Rapid, Commuter, and Light Rail—Stations—42 USC §§12147(b), 12162(e)(2)(A), 12162(e)(1)-(e)(2)(B), 12146, 12147 & 49 CFR §§37.47, 37.53, 37.59

Key stations in rapid rail, commuter rail, and light rail systems were to be made accessible as soon as practicable but in no event later than July 26, 1993. The time limit for rapid and light rail may be extended by the Department of Transportation up to 30 years for extraordinarily expensive structural changes to, or replacement of, existing facilities necessary to achieve accessibility. If 30 years are given, a rail system must complete two-thirds of the stations within 20 years. For commuter rail, the time limit for extraordinarily expensive structural changes may be extended by the Department of Transportation for up to 20 rather than 30 years. Extraordinarily expensive structural changes means installations of elevators, raising the entire passenger platform, or alterations within a station of similar magnitude and cost.

The process of designating key stations must have significant involvement by the disability community. The public transit agency must develop a plan for compliance that involves consultation with affected individuals with disabilities and establishes milestones for achievement of the required level of access. A public hearing should be held during the deliberation process.

It is discrimination to build a new station for commuter, rapid, or light rail use that is not readily accessible to and usable by individuals with disabilities.

Paratransit Is Required for Rapid and Light Rail Systems

ADA places paratransit requirements on agencies that operate rapid and light rail systems. In general, the requirements for rail paratransit are the same as for bus paratransit and are detailed above. The rest of this section contains the requirements for rail paratransit that are different from the bus requirements.

The service area for rail transit will consist of a circle with a diameter of 1.5 miles around each station (whether or not it is a key station). The transit agency is required to provide trips from any point in one circle to any point in any other circle. The transit agency is not required to provide paratransit service between two points within the same circle, since a trip between two points in the vicinity of the same station is not a trip that typically would be taken by train.

Eligibility for rail paratransit is the same as for bus paratransit, except for the second eligibility category. For this category, an individual is eligible if the individual could use an accessible rail system but there is not yet one accessible car per train on the system, or key stations have not yet been made accessible. For persons in this category, the public transit agency's obligation is only to provide transportation between circles centered on key stations, since, even when the key station plan is fully implemented, these individuals will be unable to use nonkey stations.

3.1 Transportation Provided by Private Entities—42 USC §§12182-12188

Requirements for Private Entities Primarily in the Business of Transportation—42 USC §12184 & 49 CFR §§37.29, 37.103, 37.105, 37.107

Private entities primarily engaged in the business of transporting people are prohibited from purchasing or leasing a new vehicle (other than an automobile, a van with a seating capacity of fewer than eight passengers including the driver, or an over-the-road bus) to be used in a fixed-route system that is not readily accessible to and usable by people with disabilities, if the solicitation for the vehicle was made after August 25, 1990. When these providers purchase or lease a new vehicle that is to be used in a demand response system, the new vehicle need not be accessible if the transit provider can show that the system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to the level of service provided to the general public.

Private entities providing taxi and limousine service may not discriminate on the basis of disability in providing that service.

Intercity Bus Service and Over-the-Road Buses—42 USC §§12185-12186 & 49 CFR §§37.169, 37.181-215

According to regulations published September 28, 1998, beginning October 2000, for service provided by large companies (or 2001 for service provided by small companies), all new buses purchased or leased by fixed-route over-the-road bus (OTRB) companies must be accessible. Half the fleets of large OTRB operators must be accessible by October 2006; the entire fleets of these companies must be accessible by October 2012. However, if the company has not obtained enough buses in the 6 or 12 years to meet the 50 percent or 100 percent requirements, has not loaded up on inaccessible buses during the two-year phase-in period between 1998 and 2000, and has otherwise complied with ADA, the secretary of DOT can grant a time extension beyond the 6- and 12-year dates. Beginning October 2001/2002 (for large/small operators, respectively), fixed-route OTRB companies must provide service in an accessible bus to a passenger who requests it with 48 hours' advance notice. This interim service must continue until the OTRB companies' fleets are 100 percent accessible.

Beginning October 2001/2002, charter and tour companies (and any other private demand/response transit service providers) must provide service in an accessible bus to a passenger who requests it with 48 hours' advance notice.

There are two special situations affecting fixed-route service by small companies. A small company may provide equivalent service instead of acquiring accessible buses. This service must permit passengers to travel in their own wheelchairs and must provide people with disabilities service that is equivalent to that provided to nondisabled passengers, in terms of time, destination, cost, service availability, etc. This could be provided by an alternate vehicle (e.g., a van). Also, a small company that operates mostly demand-responsive service but has a small amount of fixed-route service (up to 25%) can meet all its requirements through 48-hour advance reservations.

At rest stops, OTRB companies must provide passengers with the time and assistance needed to leave and reenter the bus to use the facilities, whether or not the bus is accessible. If the bus company owns, leases, controls, or contracts with a rest stop facility, it must make sure the facility meets ADA's accessibility requirements.

Until the above requirements become effective, private companies using OTRBs are subject to general nondiscrimination requirements. They must help a passenger with a disability onto the bus if the passenger cannot board the bus independently. The provider may require up to 48 hours advance notice from individuals with disabilities for providing boarding assistance. However, if the individual does not provide advance notice for boarding assistance, the provider must provide the boarding assistance anyway, if it can do so by making a reasonable effort without delaying bus service. Mobility equipment must be stowed in the passenger compartment, if possible; or if not, in the baggage compartment.

Requirements for Private Entities Not Primarily in the Business of Transportation—42 USC §§12182(b)(2)(B), (C), (D) & 49 CFR §§37.101, 37.171

Transit providers covered by this section may not purchase or lease any vehicle, new or used, that carries in excess of 16 passengers (including the driver) for fixed-route service for which a solicitation was made after August 25, 1990, that is not readily accessible to and usable by individuals with disabilities. If such providers purchase or lease a vehicle (new or used) carrying 16 or fewer passengers (including the driver) for use in fixed-route service, the service must be operated such that it offers people with disabilities a level of service equivalent to that provided to the general public when the system is viewed in its entirety. Automobiles and vans seating fewer than eight persons are exempt from this requirement.

Each private entity not primarily in the transportation business that provides demand-response transportation must provide a level of service to persons with disabilities equivalent to the level it provides to the general public when the transit system is viewed in its entirety.

4. Telecommunications (Title IV)

Title IV of the Americans with Disabilities Act requires telecommunications relay services and closed-captioning of all federally funded TV public service announcements.

4.1 Telecommunications Relay Services—47 USC §225 & 47 CFR Parts 0 & 64

ADA required, by July 26, 1993, all common carriers (telephone companies) to provide intrastate and interstate telecommunications relay services.

ADA requires telecommunications relay services to be functionally equivalent to standard telephone service. This includes being available 24 hours a day, seven days a week, without restrictions on the type, length, or number of calls made by any relay user. Telecommunications relay service users must have access to their chosen long distance carrier, and to all other operator services to the same extent that such access is provided to ordinary voice telephone users.

ADA amends the Communications Act of 1934 and uses the administrative remedies procedure established under that act. Thus, in most situations, the Federal Communications Commission (FCC) will handle complaints. Complaints must be filed in writing and addressed to the FCC. Once a complaint is filed, the FCC must resolve it within 180 days. In addition, there is a private right of action to obtain review of FCC decisions in federal court. Attorneys' fees are available.

5. Miscellaneous Provisions (Title V)

5.1 The Relationship Between ADA and Other Laws—42 USC §12201(a) & 29 CFR §§1630.1(b)-.1(c), 1630.16(e)(2) & 28 CFR §35.103 & 28 CFR §36.103

ADA does not reduce the scope of coverage or apply a lesser standard than the coverage of Title V of the Rehabilitation Act of 1973. Also, nothing in ADA invalidates or limits any other federal law or the law of any state or local government that provides greater or equal protection than is afforded by ADA. ADA does take precedence over other laws that provide less protection. However, there may be an exception in the area of other federal laws that provide less protection than ADA.

5.2 The Relationship Between ADA and Insurance—42 USC §12201(c) & 29 CFR §1630.16(f) & 28 CFR §36.212 & 49 CFR §37.5(g)

See above sections: Employment, Public Accommodations, State and Local Government.

5.3 States Can Be Sued—42 USC §12202 & 28 CFR §35.178

States are not immune from suit under ADA. Remedies are available to the same extent as against public and private entities.

5.4 Protection Against Retaliation—42 USC §12203 & 29 CFR §1630.12 & 28 CFR §35.134 & 28 CFR §36.206

No individual or organization may discriminate against another individual who has opposed any act or practice made unlawful by ADA or because such other individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under ADA. Moreover, it is unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by ADA.

5.5 Technical Assistance—42 USC §12206 & 28 CFR §35.177 & 28 CFR §507

ADA includes a requirement that federal agencies responsible for enforcing it must provide technical assistance to covered entities as well as individuals with rights under ADA. The attorney general, in consultation with other chief government executives whose departments are affected by ADA, was required to develop the technical assistance plan by January 26, 1991, and publish it for comment. Each federal department or agency with responsibility for implementing ADA may render technical assistance to individuals and groups with rights and responsibilities under ADA. Also, each is to publish a technical assistance manual. As well, each department or agency may make grants and enter into contracts for technical assistance purposes with organizations that can provide information to covered entities and to individuals with disabilities. However, no covered entity is excused from compliance with ADA because of any lack of exposure to technical assistance or any failure of the authorized technical assistance manuals.

5.6 Coverage of U.S. Congress—42 USC §12209

ADA covers the Congress of the United States, including the Senate, the House of Representatives, and the instrumentalities of Congress. ADA details applicable remedies and procedures for dealing with complaints alleging violations of this provision. ADA's coverage of Congress was further developed in the Congressional Accountability Act of 1995.

5.7 Alternative Dispute Resolution—42 USC §12212 & 28 CFR §176

ADA encourages the use of alternative means of dispute resolution, where appropriate and to the extent authorized by law. These methods include settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration. However, the use of alternative dispute resolution mechanisms is completely voluntary and is intended to supplement, and not to supplant, the other remedies provided by ADA.

5.8 Severability—42 USC §12213

If one provision of ADA is found to be unconstitutional, it will not automatically invalidate any other provision of ADA.

Endnote

1. Golden, Marilyn, Kilb, Linda, and Mayerson, Arlene, *Americans with Disabilities Act: An Implementation Guide* (Berkeley, CA: Disability Rights Education and Defense Fund, 1993). Reprinted with permission, with minor changes.

APPENDIX C: ADA MEDIATION GUIDELINES

The Kukin Program for Conflict Resolution at Benjamin N. Cardozo School of Law

Yeshiva University

The Kukin Program for Conflict Resolution at Benjamin N. Cardozo School of Law is the Institutional Home of the ADA Mediation Guidelines.

The ADA Mediation Guidelines and an ongoing discussion of issues related to the Guidelines are posted on the Cardozo Online Journal of Conflict Resolution (COJCR), the original publisher of the Guidelines, at: www.cardozo.yu.edu/cojcr/guidelines.htm.

Mediators, program administrators, mediation consumers, and advocates are encouraged to put the Guidelines into practice and participate in ongoing collaboration regarding their application and development through the discussion group at www.adamediation.org/forum.

This project has been implemented with the support of the Bell Atlantic Foundation and the Center for the Independence of the Disabled of New York.

For more information about the ADA Mediation Guidelines, contact Judith Cohen, Project Coordinator, at 212-741-3758 (Voice/TTY) or coordinator@adamediation.org.

Introduction

The ADA Mediation Guidelines for mediation providers are the product of a national Work Group convened to develop mediation practice guidelines unique to conflicts arising under the Americans with Disabilities Act (42 USC Sec.12101-12213) ("ADA") and similar laws promoting the eradication of discrimination against persons with disabilities.

The ADA Mediation Guidelines were developed between January 1998 and January 2000 by a Work Group composed of 12 mediation practitioners, trainers, and administrators. (See Appendix 3 for the list of Work Group members.) The guidelines address ADA mediation issues in the areas of program and case administration, process, training, and ethics. A draft—and later, the interim standards—were widely distributed for public comment during the development period. The final guidelines could not have been developed at all were it not for the tremendous collaboration and valuable comments contributed by many mediators, stakeholders, and advocates. The Work Group expresses its appreciation to the many people who contributed to this effort.

The term "ADA mediation," as used in this document, applies to programs mediating claims arising under the Americans with Disabilities Act and other disability civil rights statutes, such as the Rehabilitation Act of 1973, the Fair Housing Amendments Act of 1988, and comparable state and local civil rights laws. The mediation of special education disputes raises issues that are not addressed here.

The guidelines provide direction for mediators, administrators, funders, and consumers of ADA mediation. They also provide direction for disability access in any type of mediation involving persons with disabilities, such as family, commercial, or labor mediation. The guidelines are available to be followed voluntarily by individual mediators and mediation provider organizations who wish to signal to potential parties and mediation participants their familiarity with disability issues and their commitment to high-quality ADA mediation services.

In developing the guidelines, the Work Group reviewed existing mediator codes of conduct and other relevant documents to ensure that the guidelines were in keeping with already developed work in the field. The ADA Mediation Guidelines address only issues that are unique to resolving disability-related disputes. The guidelines do not include basic mediation ethics, general principles of administering a mediation program, or educational information about ADA regulations, compliance, or disability access. Codes and resources that informed the development of the guidelines are available to persons seeking additional information on integrating the guidelines into mediation practice (see Appendix 1). Illustrations of the practice implications of certain guidelines appear in appendix 2.

Public policy and legal issues often arise in ADA mediations. These guidelines do not constitute legal advice. Persons interested in ADA mediation are encouraged to consult with attorneys and legal resources for substantive interpretation of the ADA and related disability civil rights statutes and regulations.

The Work Group wishes to thank the Kukin Program for Conflict Resolution at Benjamin N. Cardozo School of Law, under the direction of Lela P. Love, for providing an institutional home for the ADA Mediation Guidelines. The Cardozo Online Journal of Conflict Resolution (COJCR) maintains a copy of the guidelines on its Web site at www.cardoz.yu.edu/cojcr/guidelines.htm.

An ongoing discussion of issues related to ADA mediation and to the guidelines is posted at www.adamediation.org/forum.

February 16, 2000

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ADA MEDIATION GUIDELINES

I. Program and Case Administration

This section of the guidelines refers to the administration of mediation programs and to the administration of cases by mediation providers, both mediation provider organizations (any entity that manages or administers mediation services) and private mediators.

A. Program Development

1. Providers, staff, and volunteers involved in ADA mediation in any capacity should be trained in disability-related issues and ADA compliance requirements, according to their particular program's needs and structure.
2. Mediation providers should be responsive to their constituents. The input of people with disabilities and other stakeholders should be considered in program development and evaluation.

B. Disability Access to Mediation

Mediation providers have obligations to make their services accessible to persons with disabilities. These obligations are articulated in ADA Title III (Public Accommodations), under which mediation providers would be considered as "Service Establishments"; in Title II (Public Service) if they are state or local government entities such as publicly funded court or community mediation programs; and in Title I (Employment) for internal employment dispute resolution programs. Mediation provider organizations and private mediators may not charge the individual with the disability for any expenses relating to making the session accessible.

1. ADA mediation providers should make all aspects of mediation—ranging from training to mediation sessions—accessible to persons with disabilities, including parties and other mediation participants, staff, volunteers, and mediators. For these purposes, the broadest definition of disability should be applied, including chronic conditions, episodic symptoms, and temporary disabilities. This is in keeping with generally accepted mediation principles that the parties be able to participate fully in the process. Persons conducting intake or case development should notify the mediator of a case of any disability accommodation required to enable a party's participation in the mediation. (See illustration in appendix 2.)

2. Mediation provider organizations should have in place policies and procedures concerning accessibility for persons with disabilities. Essential components include procedures for requesting a disability accommodation, for grieving the denial of accommodations, and a nondiscrimination policy that includes disability. The policies and procedures should be communicated to the parties, to mediation participants, to mediators, and to staff and volunteers.

C. Mediator Recruitment and Selection

1. ADA mediation presents complex issues, and mediation provider organizations that provide ADA mediator training should select mediators who have mediation experience in addition to training.

   Mediation provider organizations that do not provide ADA mediator training should select as mediators only persons who have completed advanced ADA Mediation Training as set out in Section III of these guidelines, or who have equivalent knowledge.

2. Provider organizations should have a diverse pool of mediators. Diversity recruiting efforts should include seeking out qualified mediators who have disabilities.

D. Party Capacity

1. In order for the mediation process to work, the parties must be able to understand the process and the options under discussion and to give voluntary and informed consent to any agreement reached. Mediators and provider organizations, therefore, should determine whether the parties in a mediation have the capacity to do so. In making such determinations, neither the mediator nor the provider organization should rely solely on a party's medical condition or diagnosis. Instead, they should evaluate a party's capacity to mediate on a case-by-case basis, if and when a question arises regarding a party's capacity to engage in the mediation process and enter into a contract.

2. This evaluation should be based on several factors. The mediator should ascertain that a party understands the nature of the mediation process, who the parties are, the role of the mediator, the parties' relationship to the mediator, and the issues at hand. The mediator should determine whether the party can assess options and make and keep an agreement. An adjudication of legal incapacity is not necessarily determinative of capacity to mediate. (See illustration in appendix 2.) However, a mediation agreement signed by a person without legal capacity may require co-signing by a surrogate to ensure its enforceability.

3. Capacity is a decision-specific concept. Capacity to mediate may not be the same as capacity to make financial or health care decisions, to vote, marry, or drive. A party with a judicial determination of incapacity may still be able to participate in

mediation. Conversely, a party without such a determination may not have the ability or understanding to participate.

4. If a party appears to have diminished capacity or if a party's capacity to mediate is unclear, the provider organization or the mediator should determine whether a disability is interfering with the capacity to mediate and whether an accommodation will enable the party to participate effectively. If so, the provider organization or the mediator should offer such an accommodation.

5. The provider organization or mediator should also determine whether the party can mediate with support. If a representative, such as an attorney or support person, is present or participating, the party with diminished capacity remains the decision-maker in any agreement.

6. If, despite support, a party lacks capacity to participate in the mediation, mediation should not proceed unless a surrogate participates in the process to represent the interests of the party and make the mediation decisions in place of the party. Surrogates are defined according to state law, and might be agents under durable and health care powers of attorney, guardians, or family members. The surrogate and the person represented by the surrogate should be present and participate when possible. The mediator should encourage the surrogate to express the party's interests, values, and preferences.

E. Party Preparedness

1. Provider organizations and mediators should encourage the parties to become aware of their legal rights and responsibilities under the ADA prior to the mediation so that the parties participate meaningfully and make informed decisions.

2. While providers may supply parties with educational materials, such as booklets on ADA rights and responsibilities, this information is not a substitute for legal representation. Before the mediation session, and at the outset of the session, parties should be advised that they may obtain independent legal or other representation. Parties in an ADA mediation should also be advised of the risks of not being represented by counsel or of not having a potential agreement reviewed by counsel. The provider or mediator may refer parties to resources to seek representation.

F. Referral of Cases to Mediators

The provider organization should provide the mediator with sufficient information about the case to permit the mediator to plan and conduct the mediation competently. Such information may also be conveyed to the mediator directly by the parties or their representatives, if they are represented. Disability-related information will ordinarily be provided by the parties, and other appropriate mediation participants (particularly representatives and resource persons) during the course of the mediation. However, prior knowledge may be critical to the mediator's effective management of the mediation process. Prior knowledge may also alert the mediator to the need for the participation of a resource person in the session, if the parties or their representatives have not already raised this issue.

II. Mediation Process

A. Mediation Techniques or Methods

1. These guidelines do not advocate a particular mediator orientation, strategies, or techniques, except as those may affect disability-related issues.
2. In ADA cases where reasonable accommodations are an issue, the joint session provides an opportunity for the parties to engage in the "interactive process" (favored by the EEOC, courts, and commentators) to identify and evaluate accommodation alternatives (42 USC 12101-1630.9). However, when this process is taking place in the context of mediation, it must be clear that anything said or done—even as part of the interactive process—will remain confidential and inadmissible as evidence in any legal proceeding unless otherwise agreed to by the parties.

B. Other Mediation Participants

The role of some mediation participants may overlap. However, the role of mediation participants should be as clearly defined as possible.

1. Representatives

   a) The parties may bring a representative of their choice to the mediation session. A representative is an individual who serves as an agent and advocate for the party, advising, counseling, or presenting the party's views. Unlike a surrogate, who is legally authorized to make decisions on behalf of the party, a representative does not make decisions on the party's behalf. The representative may be a disability rights advocate, expert, vocational rehabilitation counselor, job coach, family member, attorney, union representative, or other person.

   b) A party may bring a support person, as a representative or in addition to the representative, to help the party throughout the mediation process, for example by providing emotional or moral support.

c) Where representation might serve the interests of the parties to ensure effective participation and thoughtful decision-making, the mediator may suggest that the parties (or one party) obtain representation.

d) The roles of support person, surrogate, and representative may vary, depending on the circumstances of the parties, a case, or a mediation.

2. Neutral experts and resource persons

Supplementary disability-related information might be critical to the resolution of a dispute. The parties may engage experts or, with the parties' permission, the mediator may invite a neutral expert to educate the mediator and the parties about the disability and to assist in developing options.

3. Personal assistants

Persons with disabilities may be accompanied by a personal assistant (PA) who is supervised by the person with a disability and provides physical aid or other assistance. The PA should not speak on behalf of the person with the disability or assist with his/her communication, unless requested to do so by that individual.

4. Interpreters

A qualified sign language or oral interpreter has the dual role of being a "disability accommodation" for persons who are deaf, hard of hearing, or who have speech disabilities, and of facilitating communication between these persons and other participants in the session. The mediator should allow the interpreter to confer with the individual with a disability to clarify terms before and during the mediation.

III. Mediator Training

A. ADA Mediator Training Contents

At a minimum, ADA mediator training should include the following:

1. Substantive law and procedural issues

    a) ADA or other applicable federal or state statutes and/or local ordinances

    b) State and federal regulations and policy statements

    c) Court decisions applying these legal principles

d) Other related laws (e.g., Family and Medical Leave Act of 1993, Workers Compensation, Age Discrimination in Employment Act, Social Security Disability)

e) Mediating in a unionized setting (for employment mediation training)

f) The administrative processes for handling disability cases in federal, state, and local agencies and the courts, where appropriate

g) Settlement/release and employee benefits options (for resolutions where the employee does not return to work)

2. Disability awareness

a) Disability etiquette (see illustration in appendix 2) (appropriate ways to interact with people with disabilities and terminology) (see illustration in appendix 2)

b) Addressing one's own biases about disability (see illustration in appendix 2)

c) Common disabilities, their impact on persons' functioning, and accommodation options

d) Planning and running an accessible session

e) Disability resources, including sources of information and technical assistance

3. Practical application

a) Common ADA dispute issues and options in the area to be handled by the mediators (e.g., employment, public accommodations, and housing)

b) Adaptation of mediation techniques to ADA mediation and unique circumstances of people with particular disabilities

c) Ethical considerations

d) ADA Mediation Guidelines

B. ADA Mediator Training Logistics

1. ADA mediator training—for already trained, experienced mediators—should be a minimum of 14 hours in length. The following time guidelines are advisory only,

as some subject areas may require more time, based on the needs of the program, and some areas may be combined.

a) Substantive law and procedural issues—3 hours. However, more time may be required, depending on the legal issues covered and the extent of prior legal training of the trainees. Discussion and activities, such as case studies, should be included in addition to lectures. Legal issues are also covered throughout the entire training through discussion, role-plays, and other practical application activities.

b) Disability awareness—3 hours.

c) Practical application—8 hours. In addition to presentation of practical ADA mediation skills, this should include role-plays, discussion, and other participatory activities. Role-play exercises should be designed to reflect the types of disability-related disputes in which the trainees will likely be involved as mediators.

2. Training should include at least one opportunity for participants to interact personally with a person who has a disability.
3. Each training participant should participate in role-plays of ADA disputes, including role-play as a mediator, and in debriefing and receiving feedback.
4. A trainer skilled in ADA mediation must be present throughout the training. The section on substantive law and procedural issues may be presented by a nonmediator, and the disability awareness section may be presented by persons with disabilities who do not have mediation expertise.
5. ADA mediation training manuals should include a copy of the laws and regulations applicable to cases that mediators will be mediating, a list of national and local disability-related resources, and basic information about reasonable accommodations and disability etiquette and terminology.
6. Some mediation provider organizations provide ADA mediator training and offer trainees who successfully complete the training opportunities to mediate. Such organizations should require that training participants demonstrate, through an evaluated performance, sufficient competency in the areas of ADA mediation practice addressed in training before providing mediation services. This may be done after an apprenticeship period but before the mediator conducts an unsupervised mediation. ADA mediator training programs that do not provide mediation services do not have an obligation to evaluate training participants.

C. Posttraining/Mediator Support

1. To ensure quality mediation services, mediator feedback and ongoing support and skills development are recommended. Mediator apprenticeship should include observing actual ADA mediation sessions conducted by experienced ADA mediators, conducting ADA mediations with, or observed by, a skilled ADA mediator, and participating in follow-up debriefing with the observing mediator or co-mediator, including an evaluation of the apprentice's performance.
2. Mediators need to keep abreast of developments in ADA and in the ADA mediation field. ADA mediation provider organizations should require that ADA mediators fulfill a certain minimal number of continuing education hours annually, addressing ADA and other disability-related topics. ADA mediation continuing education may include nonmediation areas such as disability-related public hearings, workshops provided by Independent Living Centers and other disability organizations, or workshops on disability issues.

IV. Ethics

The following ethical guidelines are minimum guidelines unique to ADA mediation that mediation provider organizations and mediators should follow. These guidelines should be considered in conjunction with basic ethical standards of mediation, which are not addressed here.

A. Mediator Competency

1. Mediators should have knowledge of disabilities, disability access, and disability law. This includes being aware of general ADA case law developments and guidance issued by regulatory agencies. The ADA mediator needs to have information about the status of the law to work with the parties effectively in exploring the range of settlement options, and to know if the parties are making informed decisions and enforceable agreements.
2. ADA mediators should not accept cases for which they are not qualified. Where particular background information is required for ADA mediations, mediators should acquire legal or disability-related information in order to have sufficient knowledge to mediate the case competently.

B. Fair Process

1. The mediator should encourage parties to seek information and advice from relevant sources during the course of the mediation. Agreements should be based on a clear understanding of the issues, options and facts of the particular case.

Agreements should never be coerced by the mediator or by the mediation provider organization. The mediator should make every effort to ascertain whether the parties have a sufficient understanding of their rights and obligations under the ADA, and the implications of any (a) agreement that they reach or (b) decision to reject an offer of settlement.

2. Where the mediator believes that a party(ies) does not understand the implications of a contemplated agreement, the mediator should encourage the parties to consult appropriate sources of information and advice.
3. The mediator should terminate the mediation if he or she believes that the parties' agreement would be inconsistent with principles of mediation ethics (such as those listed here and those articulated in the standards of practice listed in appendix I).
4. The mediator should ask whether the parties have considered the impact of parties who are not at the table, such as a labor union, on the enforceability, successful implementation, or durability of the agreement.

C. Legal and Disability-Related Information

ADA mediators should use their knowledge of the law and disability issues to assess when unrepresented parties need legal or other counsel, or when the participation of an expert or resource person would be advisable. Mediators may encourage one or more of the parties to consider obtaining such assistance where needed. However, such encouragement should be given in a manner that protects the mediation process. Discussing matters of this kind in a private caucus session of the mediation is often preferable to doing so in a joint session.

D. Confidentiality

1. Mediators should maintain confidentiality with respect to disability-related information in arranging access and when conducting the mediation. While the person with the disability may have disclosed his or her disability, there still may be information that the person does not wish to reveal, such as the diagnosis or the severity of his or her limitations or health problems. Where a mediator believes that disclosure of such information would enhance the mediation process or would otherwise be beneficial to the parties, the mediator should invite disclosure by the person with a disability during private caucus but may not disclose the information without the person's permission.
2. If a mediator withdraws from a case because the mediator believes that one or more of the parties does not understand the implications of the agreement or the terms of a potential agreement, or for any other reason, he or she should do so in a

manner that protects the confidentiality of the parties' communications in the mediation to the fullest extent legally possible.

Note: These guidelines are not intended to be used in litigation involving the practice of mediation—either as evidence of a standard of due care for ADA mediators or as a measure of "reasonable accommodation" for purposes of establishing liability on the part of mediators. Instead, these guidelines represent a set of aspirational principles and practices that the Work Group recommends to ADA mediators and mediation providers. The Work Group is not a government organization, therefore, its views on the matters addressed in these guidelines do not have the force of law in any jurisdiction unless they are adopted by rule or statute by a government body.

Appendix 1: Resources

The following is a list of some of the codes and protocols that were reviewed by the drafters of the ADA Mediation Guidelines, along with the Web sites where they can be located and a phone number for obtaining copies. These codes and protocols include basic mediation standards that the ADA Mediation Guidelines do not address. There are numerous other codes. Providers and mediators should be aware of developments, including codes of the ethics and mediation practice standards, in their own jurisdictions.

"A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship,"
5/9/95, www.adr.org (under "Protocol")
212-716-3981
American Arbitration Association (AAA)

"Ethical Guidelines of Professional Responsibility,"
6/86, www.spidr.org
202-667-9700
Society of Professionals in Dispute Resolution (SPIDR)

"Model Standards of Conduct for Mediators" 1994
American Arbitration Association/American Bar Association/Society of Professionals in Dispute Resolution
www.adr.org
212-716-3981, AAA
(Under "Rules & Procedures, Ethics & Guidelines")

"Guidelines for Voluntary Mediation Programs Instituted by Agencies Charged with Enforcing Workplace Rights"
1/24/98, www.spidr.org
202-667-9700 SPIDR

"Quality Assurances Statement"
6/96, www.nafcm.org
202-667-9700
National Association for Community Mediation (NAFCM)

Federal Enforcement Agencies

Equal Employment Opportunity Commission (EEOC)
www.eeoc.gov

800-669-EEOC (voice), 800-800-3302 (TTY) (for deaf and speech impaired telephone users)
Documents on ADA employment issues, including policy guidance:
800-669-4000 (V) 800-669-6820 (TTY)
Guidance on ADA employment issues.

Access Board
www.access-board.gov
800-USA-ABLE (V/TTY)
Technical assistance and documents on the ADA Accessibility Guidelines and Architectural Barriers Act, and enforces Architectural Barriers Act.

Department of Justice, Civil Rights Division
www.usdoj.gov/crt/ada/adahom1.htm
800-514-0301 (V), 800-514-0383 (TTY)
ADA information, documents, and technical assistance (Titles II/public service and III/public accommodations, Section 504 of the Rehabilitation Act). Issues quarterly reports.

U.S. Department of Transportation
www.fta.dot.gov
888-446-4511 (Voice only)
Enforces ADA provisions governing mass transportation systems and services.

Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity
800-343-3442 (V), 800-483-2209 (TTY)
Enforces disability rights in housing.

Federal Communications Commission
www.fcc.gov
Documents 202-857-3800 (V), 202-293-8810 (TTY)
Questions 202-418-1898 (V), 202-418-2224 (TTY)

Note: These Web sites have links to other disability-related Web sites.

Other Disability Resources

Job Accommodations Network (JAN)
janweb.icdi.wvu.edu/english/homeus.htm
800-ADA-WORK (Voice/TTY)
A service of the President's Committee on Employment of People with Disabilities
Information and guidance on reasonable accommodations in the workplace.

ADA Disability and Business Technical Assistance Center (DBTAC)
www.adata.org
800-949-4232 (V/TTY)
Technical assistance on rights and responsibilities under the ADA.

The American Bar Association (ABA) Commission on Mental and Physical Disability Law
www.abanet.org/disability
202-662-1570
Directory of attorneys specializing in disability law.

The ABA Commission on Mental and Physical Disability Law and commercial enterprises such as BNA, LRP, Commerce Clearing House, Thompson, and Prentice Hall publish disability law reporters, which are a good source for keeping up-to-date with case law.

Disability Awareness Materials

"Targeting Disability Needs: A Guide to the Americans with Disabilities Act for Dispute Resolution Programs" published by the American Bar Association, the American Association of Retired Persons, and the National Institute for Dispute Resolution. Order through The American Bar Association (ABA) Commission on Mental and Physical Disability Law
www.abanet.org/disability
202-662-1570

"Disability Etiquette: Tips on Interacting with People with Disabilities," published by Eastern Paralyzed Veterans Association. Order through EPVA hotline:
publications@epva.org
800-444-0120

"Making Dispute Resolution Sessions Accessible to People with Disabilities" by Judy Cohen, SPIDR News, Spring 1997.
(Society for Professionals in Dispute Resolution, 202-667-9700, and at www.mediate.com/articles.)

Appendix 2: Supplemental Examples

I. Program and Case Administration

B. Disability Access to Mediation

1. ADA mediation providers should make all aspects of mediation—ranging from training to mediation sessions—accessible to persons with disabilities, including parties and other mediation participants, staff, volunteers, and mediators. ...Persons conducting intake or case development should notify the mediator of a case of any disability accommodation required to enable a party's participation in the mediation. (See example below)

Inaccessible case scenario: A person who has self-identified as having a traumatic brain injury (TBI) has trouble sequencing and has poor short-term memory. She is unable to keep track of the proceedings, repeats herself, can't organize her responses, and asks questions that have already been answered. The mediator believes that she's being disruptive, not paying attention, and not participating in good faith. The process breaks down.

Same scenario, with mediator who uses effective process adaptations: Having been informed that the party has TBI, the mediator—before the session—inquires as to the person's needs and limitations in order to make the session accessible. Based on the person's input, the mediator periodically reviews what has been said in the session, and works with a flip chart so that the person with TBI can follow and participate in the proceedings. Alternately, if the mediator was not informed before the session, she inquires about the person's needs during a private caucus, even if she is knowledgeable about TBI, as it affects people differently.

D. Party Capacity

2. "... An adjudication of legal incapacity is not necessarily determinative of capacity to mediate."

For example, a resident of a nursing home who is legally incapacitated may have disputes with a roommate about space or TV, or with staff about eating or dressing schedules. This person may have the capacity to participate in mediation regarding these issues. Also, persons may be under limited guardianships. For instance, a person could have a guardian (sometimes called a conservator) for financial decisions but not for health care or personal decisions, and so this person could participate in a mediation about health care treatment.

III. Mediator Training

A. ADA Mediator Training Contents

2. Disability awareness

   a) Disability etiquette[1]

Scenario without disability etiquette: A blind man is a party to a mediation. The mediator starts the session by saying the names of the parties, their advocates and the other mediation participants and gesturing toward each as he or she says the name. The blind man, feeling disempowered because this introduction was not accessible to him, feels uncomfortable. He spends the session wondering who is speaking and has trouble following the course of the session.

Same scenario, with the mediator using disability etiquette: The mediator starts off the session by going around the table and having each person, including observers, say their name and their role in the mediation. The blind man is able to identify who is speaking by voice and location. He has equal access to participate fully in the session.

Scenario without disability etiquette: There is a sign language interpreter at a mediation because one of the parties is deaf. The mediator starts the session without mentioning the presence of the interpreter (he or she wants to be sensitive and not call attention to the deaf person). The interpreter voices for the deaf person, and the hearing persons all look at the interpreter as she speaks. When they have comments or questions for the deaf person, they also address these to the interpreter. As a result, the deaf person feels ignored and does not experience herself as an equal participant in the session. She finally gives up and says less and less, since no one seems to be listening or talking to her.

Same scenario, with mediator using disability etiquette: The mediator opens the session by explaining that the interpreter is there to facilitate communication between deaf and hearing participants, and that the mediation participants should address each other and not the interpreter. Result: the deaf person is able to communicate on an equal basis with the other mediation participants.

A. ADA Mediator Training Contents

1. Disability awareness

    a) Appropriate terminology

Scenario with inappropriate terminology: A person who uses a wheelchair is a party to a mediation. The mediator refers to her as being "wheelchair bound." The wheelchair user is offended by the term, and feels that the mediator must be on the other party's side or at least cannot possibly understand her perspective.

Same scenario, with mediator using appropriate terminology: The mediator refers to the party as "using a wheelchair." This term may strike the wheelchair user as neutral or may lead her to believe that the mediator will understand the issues at hand.

A. ADA Mediator Training Contents

2. Disability awareness

    b) Addressing one's own biases about disability

Scenario, where mediator is not aware of his or her own biases: An employee with major depression has been disciplined for excessive tardiness. The mediator assumes that the employee is ashamed of having depression, and carefully avoids discussing it with him—either in arranging the session or during it. The session is scheduled for 8:00 a.m. When the mediator confirms the date and time with the employee, he says, "Oh, well, okay." The mediator takes that as a "yes." The employee arrives 30 minutes late for the mediation and looks disheveled. The supervisor is exasperated, saying, "See? This is what I have to put up with every day." The employee seems "out of it" and participates less and less as the session goes on. The mediator is beginning to wonder how he ever held a job in the first place, and unconsciously discounts the few remarks that the employee makes. In private caucus, the mediator starts by raising questions about the possible consequences of the employee's tardiness. The employee looks as though he's about to cry, then silently gets up and leaves the room, then the premises.

Same scenario, but with a mediator who is informed and unbiased about psychiatric disabilities: The mediator is aware that passivity can be a barrier to full participation in mediation for people who are depressed, and knows that psychiatric medications can have side effects that affect the person's functioning. In confirming the time of the mediation with the employee, the mediator notices the employee's hesitancy, and adds, "You know, I have been informed that you have major depression. I wanted to be sure to talk to you about that before the session. Is there anything you want me to know about how this condition or any treatment you're receiving for it might be affecting you?" The employee is relieved to have this opening and speaks for several minutes about how sedated he feels in the morning because of his antidepressant medications, and how much energy it has taken to get to work at all, albeit late. After listening, the mediator asks if the employee is comfortable with the proposed schedule or would like to propose another time. The mediation is scheduled for 11:00 a.m., when the employee is most alert and able to concentrate and participate.

Endnote

1. Disability etiquette is the "cultural" aspect of interacting with persons who have disabilities. Observing disability etiquette not only makes the person with a disability more comfortable, but also contributes to the accessibility of the process.

Appendix 3: ADA Mediation Guidelines Work Group Members

Melissa Brodrick, Board Member, National Association for Community Mediation (NAFCM), Belmont, MA

Judith Cohen, Mediator and Executive Director, Access Resources, New York, NY
(ADA Mediation Guidelines Work Group Coordinator)

Samuel H. DeShazer, Planning Committee Member and Faculty, Institute for ADA Mediation (Hall, Render, Killian, Heath & Lyman, PSC), Louisville, KY

Art Finkle, New Jersey SPIDR; Alternative Dispute Resolution Director, New Jersey Department of Personnel; and Associate Professor, Rider University, Graduate Program of Education and Human Services, Trenton, NJ

Winnie M. Hargis, Private Mediator and ADA Consultant, Dalton, GA

David Hoffman, American Bar Association Section of Dispute Resolution (Hill & Barlow), Boston, MA

Laura L. Mancuso, Independent Consultant and Mediator, Goleta, CA

Kathryn McCarty, American Bar Association Section of Dispute Resolution and Co-President, ADR Vantage, Washington, DC

Alice Norman, Mediator/Civil Rights and Accessibility Specialist, U.S. Department of Interior, Boise, ID

Elizabeth Plapinger, Advisor, CPR Institute for Dispute Resolution, New York, NY

Anne B. Thomas, Director of EEO, University of New Mexico, Albuquerque, NM

Doug Van Epps, Director, Office of Dispute Resolution, Michigan Supreme Court, Michigan State Court Administrative Office, Lansing, MI

Note: Work Group members who represent organizations listed above functioned as liaisons. Their participation does not indicate organizational endorsement of the guidelines.

Reproduction and distribution of the ADA Mediation Guidelines is encouraged.

Single copies of the ADA Mediation Guidelines are available from:

American Bar Association Section of Dispute Resolution, 202-662-1680.

National Association for Community Mediation, 202-667-9700, ext. 224 (contact person: Thameenah Muhammed)

CUNY Dispute Resolution Consortium, 212-237-8692

Kukin Program for Conflict Resolution at Benjamin N. Cardozo School of Law, 212-790-0365 (contact person: Professor Lela P. Love)

For single copies in alternative formats (braille, large print, audiotape, computer disk), call 212-790-0365 or e-mail coordinator@adamediation.org.

The Kukin Program for Conflict Resolution

Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York, NY 10003
New York, NY 10003
212-790-0365
Fax 212-790-0256

APPENDIX D: LIST OF PERSONS INTERVIEWED

Department of Education

Elinor Baker, Customer Service, Office for Civil Rights
Rebecca Fitch, Office for Civil Rights
Eileen Hanrahan, Office for Civil Rights
Tin-Ting Wang, Office for Civil Rights
Joseph DePhillips, Rehabilitation Program Specialist, National Institute on Disability and Rehabilitation Research

Equal Employment Opportunity Commission

Kathleen Courtney, Senior Attorney, ADA Policy Division
Celeste Davis, Supervisory Attorney, Chicago District Office
Christopher J. Kuczynski, Assistant Legal Counsel, Director of the ADA Policy Division
Peggy Mastroianni, Associate Legal Counsel, Coordination and Guidance Services
Paul Miller, Commissioner
Susan Oxford, Attorney, Advisor to the General Counsel, Office of the General Counsel
Adele Rapport, Regional Attorney, Detroit District Office
Leo Sanchez, Director, Charge Data System Division
Nancy Siegel, Assistant to Commissioner Miller

Department of Health and Human Services

Omar Guerrero, Deputy Director, Office for Civil Rights
Trish Mackey, Deputy to the Associate Deputy Director of the Office of Program Operations, Office of Program Operations

Department of Justice

Elizabeth Bacon, Certification and Coordination, Disability Rights Section
Jim Bostrom, Architect, Disability Rights Section
Irene Bowen, Deputy, Disability Rights Section
Janet Blizard, Certification and Coordination, Disability Rights Section
Phil Breen, Special Legal Counsel, Disability Rights Section
Sally Conway, Technical Assistance Unit, Disability Rights Section
Thomas Esbrook, Investigator, Disability Rights Section
Ruth Lusher, Director, Technical Assistance Unit, Disability Rights Section
Ed Miller, Trial Attorney, Disability Rights Section
Naomi Milton, Acting Supervisory Attorney, Disability Rights Section
Allison Nichol, Deputy, Disability Rights Section
Bebe Novich, Trial Attorney, Disability Rights Section

Joe Russo, Trial Attorney, Disability Rights Section
Elizabeth Savage, Counsel to the Assistant Attorney General, Civil Rights Division
Dan Sering, Administrator, Disability Rights Section
Jessica Silver, Principal Deputy Chief, Appellate Section, Civil Rights Division
Janine Warden, Disability Rights Section
Sally Willis, Technical Assistance Unit, Disability Rights Section
John Wodatch, Section Chief, Disability Rights Section
Renee Wohlenhaus, Deputy, Disability Rights Section

Department of Labor

Joyce Brown, Regulations Branch, Policy Division
Jeff Brown, Compliance Office, Washington District Office, Office of Federal Contract Compliance Programs
Randy Cooper, Special Assistant to the Deputy Assistant Secretary
Joyce Dorey, Division of Management and Administration
David Gregal, Policy Division Branch
Frankie Taylor, Quality Assurance

Department of Transportation

Robert Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation
Will Baccus, Deputy Associate Counsel for General Law, Federal Highway Administration Office of the Chief Counsel
Mark Brenman, Senior Policy Advisor, Departmental Office of Civil Rights
Aretha Carr, Equal Opportunity Specialist, Federal Highway Administration Office of Civil Rights
Alex Chavrid, Passenger Programs Division, Federal Railroad Administration
Irv Chor, Office of Program Guidance and Support, Federal Transit Administration
Heidi Coleman, Chief of the General Law Division, National Highway Traffic Safety Administration Office of the Chief Counsel
John Cross, Staff Attorney, Federal Aviation Administration Office of the Chief Counsel
Gary DeLorme, Office of Program Guidance and Support, Federal Transit Administration
Marina Drancsak, Office of Research Management, Federal Transit Administration
George Duffy, Program Operations Division Chief, Federal Highway Administration Office of Civil Rights
Ed Fleischman, Director, Office of Oversight, Federal Transit Administration
Michael Freilich, Acting Chief, External Program and Policy Development Division, Departmental Office of Civil Rights
Dave Goldberg, Attorney-Advisor, Civil Rights Law, Assistant General Counsel for Environmental, Civil Rights, and General Law, Department of Transportation Office of General Counsel

Cheryl Hershey, Equal Opportunity Specialist, Office of Civil Rights, Federal Transit Administration
Bert Jackson, Acting Civil Rights Director, Federal Railroad Administration Office of Civil Rights
Nancy Johnson, Equal Opportunity Specialist, Federal Highway Administration Office of Civil Rights
Mary Jones, Deputy Assistant Administrator, Federal Aviation Administration Office of Civil Rights
Douglas Kerr, Director, Office of Program Guidance and Support, Federal Transit Administration
Ira Laster, Policy Analyst, Office of the Assistant Secretary for Transportation Policy
Arthur Andrew Lopez, Director, Federal Transit Administration Office of Civil Rights
Ray Lopez, Office of Program Guidance and Support, Federal Transit Administration
April Marchese, Special Assistant to the Chief Counsel, Federal Highway Administration Office of the Chief Counsel
Nancy McFadden, General Counsel, Department of Transportation Office of General Counsel
Dave Micklin, External Program Team Leader, Federal Aviation Administration Office of Civil Rights
Mary Elizabeth Peters, Equal Opportunity Specialist, Office of Civil Rights, Federal Transit Administration
Joe Pomponio, Trial Attorney, Federal Railroad Administration Office of the Chief Counsel
George Quick, Director, National Highway Traffic Safety Administation Office of Civil Rights
Rhonda Reed, Equal Opportunity Specialist, Federal Transit Administration, Region 5
Fanny Rivera, Assistant Administrator, Federal Aviation Administration Office of Civil Rights
Dave Sett, Attorney Advisor, Federal Highway Administration, Office of the Regional Counsel, Atlanta, Georgia
Nancy Solkowski, Office of Resource Management and State Programs, Federal Transit Administration
Ron Stroman, Director, Departmental Office of Civil Rights
Harry Takai, Equal Opportunity Specialist, Coast Guard Office of Civil Rights
Michael A. Winter, Associate Administrator for Budget and Policy, Federal Transit Administration Office of Budget and Policy
Roberta Wolgast, Equal Opportunity Specialist, Office of Civil Rights, Federal Transit Administration
Richard Wong, Attorney, Office of the Chief Counsel, Federal Transit Administration

U.S. Commission on Civil Rights

Frederick Isler, Assistant Staff Director for Civil Rights Evaluation
Rebecca Kraus, Senior Social Scientist, Office of Civil Rights Evaluation
Nadja Zalokar, Supervisory Civil Rights Analyst, Office of Civil Rights Evaluation (formerly)
Margaret Butler, Civil Rights Analyst, Office of Civil Rights Evaluation

Other Organizations

Maripat Brennan, TRS Manager, National Exchange Carrier Association, Inc.
Gil Becker, Director, Communications Access of Maryland Program, Maryland Department of Budget and Management
Dennis Cannon, Accessibility Specialist, Office of Technical and Information Services, U.S. Architectural and Transportation Barriers Compliance Board
Mel Fowler, Office of Equal Opportunity, U.S. Department of the Interior
Robert Gattis, Project Manager, ADA Impact Measurement System, Rocky Mountain Disability and Business Technical Assistance Center
Chris Griffin, Director, Disability Law Center, Boston, Massachusetts.
Pam Gregory, Deputy Director, Disabilities Issues Task Force, FCC
Bill Henning, Cape Organization for Rights of Disabled
Shelley Kaplan, Executive Director, ADA Resource Center, Southeastern Regional Disability and Business Technical Assistance Center
Rick Seymour, Attorney, Lawyers Committee for Civil Rights Under Law, Washington, D.C.
Roslyn M. Simon, Senior Director, Customer Advocacy, Amtrak
Nancy Smith, Executive Director, Project ACTION
Sara Ulis, Customer Satisfaction Service Center Advisor, Amtrak
Karen Peltz Strauss, Legal Counsel to Consumer Action Network and the National Association of the Deaf
Norma Jane Vesco, Executive Director, Independent Living Center of Southern California

APPENDIX E: DESCRIPTION OF THE MILWAUKEE COUNTY EXPERIENCE WITH A VOLUNTARY COMPLIANCE AGREEMENT: PERSPECTIVE OF A COMMUNITY MEMBER

To: Lee Schulz, Executive Director, IndependenceFirst

From: Mike Bachhuber, PAIR Advocacy Specialist, Wisconsin Coalition for Advocacy[1]

I found the fax regarding the DREDF evaluation and wanted to expand upon my telephone comments. I am arranging a meeting with Rep. Barrett to see what he can do to get better results. These are the problems we have identified and believe require action.

DOT/FTA relies almost entirely upon self-reporting to determine if its grantees comply with 504/ADA. Until the Milwaukee disability community organized complaint-writing sessions in the fall of 1997, most riders did not know such an agency existed. Because of this, the FTA did not know the depth of complaints about Milwaukee paratransit service.

It was hard to give much credibility to the agency in light of these facts. The lack of credibility was aggravated by statements from various FTA staff that they are not an enforcement agency, despite the fact that 504 and the ADA make them an enforcement agency. We were told, among other things, that no one in the agency ever remembered referring a complaint to the Department of Justice for enforcement.

The FTA sent form letters to notify complainants that their complaints were assigned to the regional office. No follow-up was done to see if the complaints were resolved. When I called to follow one complaint, I was told that the VCA process was the entire agency response to the complaints. This caused a greater loss of confidence in the agency.

The VCA was negotiated between FTA and Milwaukee County. No opportunity was given to complainants, the disability community, or others to have a voice in that process. As a result, the plan avoided several features in the existing paratransit service plan that were important to the disability community (e.g., door-to-door service with one-step limitation replaced door-through-door service) without an opportunity for the affected parties to have input.

FTA was aware that a service area problem existed in Milwaukee. Despite the fact that WCA and others had contacted the FTA regarding problems and that several commenters on the last plan, in FTA possession, raised these issues, the FTA relied solely on Milwaukee County's position. Milwaukee County argues that it can not provide paratransit service across county lines because of section 59.58(3)(j)1., Wis. Stats. It argues that this statute constitutes a barrier excusing compliance with service area requirements under 49 CFR §37.131(a)(1) and (3) despite the facts that (1) the statute was passed after the ADA regulations clarified the duty of public entities to provide paratransit service to allow counties to avoid that duty; (2) the statute does not prevent the county from operating transit services across county lines, since county buses operate across county lines and even paratransit service is provided across county lines where contracts exist to allow that service; (3) Waukesha County, subject to the same statutes, freely operates its paratransit service across county lines; and (4) the county has not complied with the recommendations of SEWRPC, the regional planning agency, that would provide for coordination of rides across county lines even though Milwaukee County vans might not be required to cross the county line. The FTA accepted Milwaukee County's statements that a legal barrier existed because it did not investigate.

The VCA itself primarily consisted of milestones in redesigning, letting, and implementing contracts for the van service. Each of the milestones was met. The VCA, however, was necessitated by Milwaukee County's failure to meet response time, capacity, and other requirements under ADA regulations. Universal access to next-day service is still not available. Excessive trip lengths, late pick-ups, and other capacity constraints are still common. We have been told the regional office recommended closing the enforcement file concerning Milwaukee County based solely upon the County's self report. Again, complainants and other interested parties were not contacted nor was any independent investigation done.

Our involvement in trying to improve the quality of paratransit in Milwaukee County has shown many problems. Some involve the hidden nature of the FTA and its complaint process. Others involve the way it investigates, or fails to do so, the claims of transit agencies and even complaints made against the agencies. We also discovered problems that are not related to the VCA.

The FTA could have a more effective process if it required transit agencies to prominently display notices in all vehicles used by transit systems that any discrimination complaints can be made to the FTA. Notices should include the FTA address and phone number. This could be further improved by requiring the agencies to notify all people who complain to them about paratransit service or other discrimination issues that complaints can be made to the FTA.

The FTA should also be required to do better follow-up with complainants. Those who have taken the effort to raise a complaint to that level should receive the courtesy of follow-through. Files should not be closed without contacting the complainants to verify that the problems have been rectified.

FTA regulations in many areas should provide a better level of protection for the rights of people with disabilities. While I have not gone into this in detail, we believe eligibility determination regulations are one area where clarification would help.

Finally, just to update you: When we filed the lawsuit, the County tried to interpose the VCA as a defense. That effort did not go far.

As you are aware, the first step was our motion for a preliminary injunction. That was resolved with a partial settlement that provided for greater consumer input in running the program and specific promises to maintain and improve service during the interim, "redesign" period.

We are now involved in substantive discussions regarding the remaining issues. The primary areas of concern involve commitments to service levels, consumer/public input, eligibility determinations, and service area. We are trying to involve the Transit Plus Advisory Council as an ongoing agent to monitor service and involve consumers in policy development and planning. We are trying to get commitments regarding service area and other service deficiencies and eligibility.

Endnote

1. This note was forwarded to M. Golden on February 23, 1999. Date of original memo unknown.

APPENDIX F: ACRONYMS AND ABBREVIATIONS

AAG	assistant attorney general
AASSWB	American Association of State Social Work Boards
ABA	Architectural Barriers Act
AC	Advisory Circular
ACAA	Air Carriers Access Act
Access Board	Architectural and Transportation Barriers Compliance Board
ACIRR	Advisory Commission on Intergovernmental Relations Report
ACTION	Accessible Community Transportation in Our Nation
ADA	Americans with Disabilities Act
ADAAG	ADA Accessibility Guidelines
ADA-TAC	ADA Technical Assistance Coordinator
ADEA	Age Discrimination in Employment Act
ADR	alternative dispute resolution
AG	attorney general
AIM	ADA Impact Measurement
ANI	automatic number identification
ANSI	American National Standards Institute
ASI	Assessment Systems, Inc.
ASL	American Sign Language
AVLS	automatic vehicle location system
CA	communications assistant
CAN	Consumer Action Network
CBA	collective bargaining agreement
CBU	Core Business Unit
CDC	Centers for Disease Control
CDS	Charge Data System
CIL	Center for Independent Living
CMS	Case Management System
COR	Council of Organizational Representatives on National Issues Concerning People Who Are Deaf or Hard of Hearing
CORD	Cape Organization for Rights of the Disabled
CRIPA	Civil Rights of Institutionalized Persons Act
DBTAC	Disability and Business Technical Assistance Center
DOCR	Departmental Office of Civil Rights
DOE	Department of Energy

DoED	Department of Education
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
DREDF	Disability Rights Education and Defense Fund
DRS	Disability Rights Section
EEOC	Equal Employment Opportunity Commission
EPA	Equal Pay Act
FAA	Federal Aviation Administration
FAAOCR	FAA Office of Civil Rights
FACA	Federal Advisory Committee Act
FCC	Federal Communications Commission
FEPA	Fair Employment Practices Agency
FHAA	Fair Housing Amendments Act of 1988
FHWA	Federal Highway Administration
FHWAOCR	Federal Highway Administration Office of Civil Rights
FIR	field-initiated research
FRA	Federal Railroad Administration
FRAOCR	FRA Office of Civil Rights
FTA	Federal Transit Administration
FTAOCR	FTA Office of Civil Rights
FTATPM	FTA Program Management Office
HCO	hearing carry over
HHS	Department of Health and Human Services
HUD	Department of Housing and Urban Development
IDEA	Individuals with Disabilities Education Act
ISTEA	Intermodal Surface Transportation Equity Act
J memo	justification memo
JAN	Job Accommodation Network
LEP	Local Enforcement Plan
LSAT	Law School Admission Test
MDTS	mobile data terminal system
MOU	memorandum of understanding
MRS	multilingual relay service
NAD	National Association of the Deaf

NARIC	National Rehabilitation Information Center
NCAA	National Collegiate Athletic Association
NCD	National Council on Disability
NECA	National Exchange Carriers Association, Inc.
NEP	National Enforcement Plan
NHTSA	National Highway Traffic Safety Administration
NHTSAOCR	NHTSA Office of Civil Rights
NIDRR	National Institute on Disability and Rehabilitation Research
NOI	Notice of Inquiry
NPRM	Notice of Proposed Rulemaking
NTP	National Training Project
OFCCP	Office of Federal Contract Compliance Programs
OFP	Office of Field Programs
OGC	Office of the General Counsel
OMB	Office of Management and Budget
OSERS	Office of Special Education and Rehabilitative Services
OST	Office of the Secretary
OTIS	Office of Technical and Information Services
PCEPD	President's Committee on Employment of People with Disabilities
PGA	Professional Golf Association
RFP	Request for Proposals
ROI	Report of Investigation
SBU	Service Business Unit
SG	solicitor general
SLS	Special Litigation Section
SSDI	Social Security Disability Insurance
STS	speech-to-speech
TA	technical assistance
TAC	Technical Assistance Coordinator
TAPS	Technical Assistance Program Seminar
TEA 21	Transportation Equity Act for the 21st Century
TE	time extension
TRB	Transportation Research Board
TRS	telecommunications relay services
TTY	telephone typewriters
U.S.C.	United States Code

UFB	undue financial burden
UMTA	Urban Mass Transportation Administration
USCCR	U.S. Commission on Civil Rights
USCG	U.S. Coast Guard
USCGOCR	USCG Office of Civil Rights
VCA	voluntary compliance agreement
VCO	voice carry over
VRI	video relay interpreting
WCA	Wisconsin Coalition for Advocacy
WMATA	Washington Metropolitan Area Transit Agency

APPENDIX G: Mission of the National Council on Disability

Overview and Purpose

The National Council on Disability (NCD) is an independent federal agency with 15 members appointed by the President of the United States and confirmed by the U.S. Senate.

The overall purpose of NCD is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability; and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.

Specific Duties

The current statutory mandate of NCD includes the following:

- Reviewing and evaluating, on a continuing basis, policies, programs, practices, and procedures concerning individuals with disabilities conducted or assisted by federal departments and agencies, including programs established or assisted under the Rehabilitation Act of 1973, as amended, or under the Developmental Disabilities Assistance and Bill of Rights Act; as well as all statutes and regulations pertaining to federal programs that assist such individuals with disabilities, in order to assess the effectiveness of such policies, programs, practices, procedures, statutes, and regulations in meeting the needs of individuals with disabilities.
- Reviewing and evaluating, on a continuing basis, new and emerging disability policy issues affecting individuals with disabilities at the federal, state, and local levels and in the private sector, including the need for and coordination of adult services, access to personal assistance services, school reform efforts and the impact of such efforts on individuals with disabilities, access to health care, and policies that act as disincentives for individuals to seek and retain employment.
- Making recommendations to the president, congress, the secretary of education, the director of the National Institute on Disability and Rehabilitation Research, and other officials of federal agencies about ways to better promote equal opportunity, economic self-sufficiency, independent living, and inclusion and integration into all aspects of society for Americans with disabilities.

- Providing Congress, on a continuing basis, with advice, recommendations, legislative proposals, and any additional information that NCD or Congress deems appropriate.
- Gathering information about the implementation, effectiveness, and impact of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).
- Advising the president, Congress, the commissioner of the Rehabilitation Services Administration, the assistant secretary for Special Education and Rehabilitative Services within the Department of Education, and the director of the National Institute on Disability and Rehabilitation and Research on the development of the programs to be carried out under the Rehabilitation Act of 1973, as amended.
- Providing advice to the commissioner of the Rehabilitation Services Administration with respect to the policies and conduct of the administration.
- Making recommendations to the director of the National Institute on Disability and Rehabilitation Research on ways to improve research, service, administration, and the collection, dissemination, and implementation of research findings affecting persons with disabilities.
- Providing advice regarding priorities for the activities of the Interagency Disability Coordinating Council and reviewing the recommendations of this council for legislative and administrative changes to ensure that such recommendations are consistent with NCD's purpose of promoting the full integration, independence, and productivity of individuals with disabilities.
- Preparing and submitting to the president and Congress an annual report titled National Disability Policy: A Progress Report.

International

In 1995, NCD was designated by the Department of State to be the U.S. government's official contact point for disability issues. Specifically, NCD interacts with the special rapporteur of the United Nations Commission for Social Development on disability matters.

Consumers Served and Current Activities

While many government agencies deal with issues and programs affecting people with disabilities, NCD is the only federal agency charged with addressing, analyzing, and making recommendations on issues of public policy that affect people with disabilities regardless of age, disability type, perceived employment potential, economic need, specific functional ability, status as a veteran, or other individual circumstance. NCD recognizes its unique opportunity to facilitate independent living, community integration, and employment opportunities for people with disabilities by ensuring an informed and coordinated approach to addressing the concerns of persons with disabilities and eliminating barriers to their active participation in community and family life.

NCD plays a major role in developing disability policy in America. In fact, it was NCD that originally proposed what eventually became the Americans with Disabilities Act (ADA). NCD's present list of key issues includes improving personal assistance services, promoting health care reform, including students with disabilities in high-quality programs in typical neighborhood schools, promoting equal employment and community housing opportunities, monitoring the implementation of ADA, improving assistive technology, and ensuring that those persons with disabilities who are members of diverse cultures fully participate in society.

Statutory History

NCD was initially established in 1978 as an advisory board within the Department of Education (Public Law 95-602). The Rehabilitation Act Amendments of 1984 (Public Law 98-221) transformed NCD into an independent agency.

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